

Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance

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The Exon-Florio Amendment to the Defense Production Act of 1950 gives the President of the United States the authority to block certain mergers or acquisitions for national security reasons. Specifically, the Act covers mergers and acquisitions that would allow foreign companies or persons to acquire control of U.S. companies. The President has delegated his Exon-Florio authority to investigate such transactions to the Committee on Foreign Investment in the United States (CFIUS), but he ultimately retains the power to approve or block transactions.

CFIUS was recently in the public spotlight due to the Committee's involvement in the attempts by CNOOC, an oil company owned by the Chinese government, to acquire Unocal Corp., an American oil company, and the attempt by Dubai Ports World, a ports management company owned by the government of the United Arab Emirates, to acquire Peninsular & Oriental Steam Navigation Co. In the wake of those two transactions various members of Congress suggested changes to the Exon-Florio statute that were meant to enhance the statute's protection of our country's national security.

Exon-Florio currently maintains a careful balance between national security and foreign investment; this balance allows for all valid national security concerns relating to covered transactions to be addressed while preventing the statute from turning into a protectionist tool that limits foreign investment in the United States. Greater congressional involvement in the CFIUS review process would politicize the process in a manner that would change Exon-Florio from a national security tool to a protectionist tool and would raise serious constitutional and policy concerns. Similarly, inserting "economic security" as a criterion for CFIUS review would take the focus off of national security and place it on economic protectionism. Replacing the Secretary of the Treasury as the chair of the committee would also upset this balance by sending a signal that our country's open investment policy is in danger while adding no additional national security

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benefit, as national security interests are already adequately represented in the CFIUS process. However, changes which would require more reporting by CFIUS to Congress on its activities would provide certain benefits while not upsetting the current national security/foreign investment balance maintained by the statute.

I. INTRODUCTION

President George W. Bush has committed his Administration to taking every possible step to protect our country's national security in light of the worldwide threat posed by Islamo-fascism, particularly in light of the terrorist attacks against our country on September 11, 2001.¹ Similarly, the Administration has been an active proponent of free trade and an open investment policy in the United States.² While both laudable, these two goals may come into conflict when foreign direct investment transactions within the United States potentially threaten national security.

This conflict between the demands of national security and an open foreign investment policy was illustrated in a very public way by two recent controversies surrounding attempts by foreign corporations to acquire American corporations: the attempt by the China National Offshore Oil Corporation, Ltd. ("CNOOC")³ to acquire Unocal, a U.S. oil company,⁴ and

¹ Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140 (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (including links to audio and video of the speech); *see also* PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA iii (2002), www.whitehouse.gov/nsc/nss.pdf [hereinafter NATIONAL SECURITY STRATEGY] ("To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing.").

² NATIONAL SECURITY STRATEGY, *supra* note 1, at 17 ("A strong world economy enhances our national security by advancing prosperity and freedom in the rest of the world We will promote economic growth and economic freedom beyond America's shores.").

³ CNOOC, Ltd., referred to in this Note as CNOOC, is a subsidiary of the China National Offshore Oil Corporation, which owns seventy-one percent of its stock. Elizabeth Douglass, *Unocal Says It Favored CNOOC Bid; The Oil Company Says it Would Have Accepted the Chinese Offer Had it Been Sufficiently Sweetened*, L.A. TIMES, July 26, 2005, at C1. The parent company is entirely owned by the Chinese government. *See* China National Offshore Oil Corporation, Corporate Information Page, <http://www.cnooc.com.cn/defaulten.asp> (last visited Oct. 8, 2006); CNOOC Limited, Company Overview Page, <http://www.cnoocltd.com/about/channel/about1281.asp> (last visited Oct. 8, 2006).

⁴ *See* Peter M. Friedman, Note, *Risky Business: Can Faulty Country Risk Factors in the Prospectuses of U.S. Listed Chinese Companies Raise Violations of U.S. Securities*

the attempt by Dubai Ports World ("DPW"), a state-owned company based in the United Arab Emirates, to acquire a British company that would have given DPW operating rights at terminals in a number of American ports.⁵ Both of these controversies featured criticism of the Committee on Foreign Investment in the United States ("CFIUS" or "the Committee"), an interagency committee chaired by the Secretary of the Treasury.⁶ CFIUS is tasked by the President under the Exon-Florio Amendment to the Defense Production Act of 1950 with reviewing mergers and acquisitions for national security concerns.⁷

CNOOC's attempt to acquire Unocal occurred in the summer of 2005. After a much-publicized bidding and public relations war for control of Unocal between CNOOC and another major U.S. oil company, Chevron, Inc., CNOOC's bid was ultimately defeated by political pressure applied by the United States Congress.⁸ Many members of Congress had publicly and forcefully expressed grave reservations about the possible national security

Law?, 44 COLUM. J. TRANSNAT'L L. 241, 274 n.181 (2005) (citing Stephanie Kirchgaessner, 'Congressional Angst' Scuppers Chinese Bid, FIN. TIMES (London), Aug. 3, 2005, at 22). The *North Carolina Law Review* very recently published a piece examining the CNOOC/Unocal transaction from the perspective of whether it would have been proper to block the transaction under the Exon-Florio statute. Michael Petrusic, Recent Development, *Oil and the National Security: CNOOC's Failed Bid To Purchase Unocal*, 84 N.C. L. REV. 1373 (2006).

⁵ David E. Sanger & Eric Lipton, *Bush Would Veto Any Bill Halting Dubai Port Deal*, N.Y. TIMES, Feb. 22, 2006, at A1; Bernard Wysocki, Jr. et al., *In Ports Furor, A Clash Over Dubai—Debate Exposes Conflicts Between Security Needs and Foreign Investment*, WALL ST. J., Feb. 23, 2006, at A1, available at <http://www.ofii.org/newsroom/news/022306wsj2.html>.

⁶ Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) [hereinafter Exon-Florio, or Exon-Florio Amendment, or the Amendment] (codified as amended at 50 U.S.C. app. § 2170 (2000)). The Amendment takes its name from its primary congressional sponsors. James J. Exon was a United States Senator from Nebraska from 1979 to 1997. See Senators of the United States: 1789–2006: A Chronological List of Senators from the First Congress to the 109th Congress 75, <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf>. James Florio was a member of the United States House of Representatives from New Jersey from 1975 to 1990, and later served as Governor of New Jersey. See Biographical Directory of the United States Congress: Florio, James Joseph, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000215> (last visited Oct. 8, 2006). The statute has been described as one of the "few restrictions" the federal government places on foreign investment coming into the United States. Cheryl Tate, Note, *The Constitutionality of State Attempts to Regulate Foreign Investment*, 99 YALE L.J. 2023, 2026 (1990).

⁷ Exon-Florio Amendment, § 5021.

⁸ Friedman, *supra* note 4.

repercussions if China's state-owned company gained control of Unocal's oil reserves.⁹ This debate led to discussion of not only national security, but also economic security.¹⁰ Even though CFIUS never initiated a review of the CNOOC transaction, let alone gave the transaction its approval, numerous members of Congress who feared that the Committee would not block the transaction began to suggest that changes to the Exon-Florio statute were in order as a means to address these concerns.¹¹

This debate over changes to Exon-Florio resumed in early 2006, when DPW attempted to purchase Peninsular and Oriental Steam Navigation Co. ("P&O"), a British firm, in a \$6.8 billion deal.¹² With the acquisition of P&O, the Dubai-based company would have acquired operational control of certain terminals at six U.S. ports.¹³ The revelation that CFIUS had approved the deal set off a firestorm of criticism on Capitol Hill as members and leaders of both political parties in Congress denounced the merger.¹⁴ Though DPW and the Bush Administration agreed to conduct an additional forty-five-day investigation under the CFIUS statute, the House Appropriations Committee voted 62-2 to effectively block the transaction, and under intense political pressure DPW agreed to transfer its U.S. ports interests to an

⁹ For example, Senator Evan Bayh of Indiana warned that CNOOC's acquisition of Unocal could have "serious consequences for our national security and energy needs." Press Release, Senator Evan Bayh, Bayh Urges Review of Chinese Bid for Unocal: Senator Asks for Report from Energy, Homeland Security and Defense Secretaries Before Review of Offer (July 22, 2005), available at <http://bayh.senate.gov/~bayh/releases/2005/07/22JULY05PR2.htm>. Other members of Congress wrote letters to the President to express their displeasure as well. See, e.g., Press Release, Senator Chuck Grassley & Senator Max Baucus, Grassley Expresses Concern Over Potential CNOOC-Unocal Deal (July 13, 2005), available at http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=4939 [hereinafter Grassley, *CNOOC-Unocal Deal*].

¹⁰ See, e.g., Edward Alden & Stephanie Kirchgaessner, *Political Payments Raise Questions: Stephanie Kirchgaessner and Edward Alden Look into Suggestions Chevron is Urging Political Allies to Oppose CNOOC*, FIN. TIMES (London), June 30, 2005, at 30. Some members of Congress proposed that economic security should become a normal element of review by CFIUS. See *infra* Part IV.B.

¹¹ Christopher Corr, *Pressures to Stiffen Exon-Florio: The Chinese Bid for Unocal Sparks a Firefight over Inbound Deals*, MERGERS AND ACQUISITIONS, DEALMAKER'S J., Jan. 1, 2006, at 36.

¹² Sanger & Lipton, *supra* note 5.

¹³ *Id.*; United States Department of Homeland Security, Fact Sheet: Securing U.S. Ports, Feb. 22, 2006, <http://www.dhs.gov/dhspublic/display?content=5437> [hereinafter Department of Homeland Security Fact Sheet].

¹⁴ See *infra* note 205.

American buyer.¹⁵ In the midst of the ports controversy, legislation was proposed in Congress not only to block the deal, but also to make substantial changes to the Exon-Florio statute in an attempt to strengthen the CFIUS review process.¹⁶ As of the time this Note goes to publication, committees in both the House and Senate have approved legislation that would modify the Exon-Florio statute.¹⁷ The full bodies have not yet approved these bills, their significant differences have not been reconciled in a conference committee, and the President has not signed a bill. Therefore, these bills' proposed changes to the statute are still mere possibilities, not certainties.

These controversies and the loud calls to amend Exon-Florio that accompanied both of them illustrate that changes to the Exon-Florio statute are likely. These changes could potentially have a tremendous impact on the country's national security and economic health.¹⁸ This Note argues that the Exon-Florio statute and CFIUS process currently maintain an appropriate balance between national security and economic security. It then examines recent congressional proposals to amend the Exon-Florio statute, and argues that such changes would have dire consequences for this balance.

Part II of this Note provides a detailed description of the Exon-Florio process as well as of the legislative history behind Exon-Florio and the executive orders that delegated the President's authority under the statute to CFIUS. It is important to understand this legislative history in order to comprehend the context in which changes to the Exon-Florio statute occur. Part III explains four major transactions that were examined by CFIUS (or in the case of CNOOC, merely mentioned in the context of a potential review

¹⁵ David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 10, 2006, at A1.

¹⁶ See *infra* text accompanying notes 196–211.

¹⁷ The Senate Banking Committee approved a bill sponsored by Senator Richard Shelby (R-AL) by a 20–0 vote on March 31, 2006. Amy Fagan, *Port Security Measures Advance in Congress; CFIUS Revamping, More Funds Proposed*, WASH. TIMES, Mar. 31, 2006, at A04. The House Financial Services Committee approved a bill sponsored primarily by Representative Roy Blunt (R-MO) which seeks fewer and less drastic changes to Exon-Florio than the Senate version. Ron Orol, *House Panel Approves CFIUS Measure*, DAILY DEAL, June 15, 2006. See *infra* text accompanying notes 205–07 for additional details.

¹⁸ The importance of national security goes without saying; it must be the primary responsibility of the President and concern of the Congress at all times, but especially so in times of war, such as today, when the country is threatened by al-Qaeda and other radical Islamic terrorist groups, Iran, and North Korea. What may be less well known is the significant contribution that investment from abroad into the United States makes to our nation's economic health. For example, in 2005 new foreign direct investment in the United States alone totaled \$79.8 billion; the payroll of U.S. subsidiaries of foreign companies was \$317.9 billion. Organization for International Investment, Top 10 List Facts About Insourcing, Mar. 2006, <http://www.ofii.org/top10FACTS.pdf>.

that never actually occurred) and that received far greater public attention than average CFIUS transactions. Part IV explains the various changes to the Exon-Florio statute that have been proposed in Congress as a result of the fear by some members of Congress that the current system is insufficient to protect the country's national security. Finally, Part V explains why the current statutory system maintains a careful balance between national security and the promotion of an open investment policy, and how the proposed changes to the Exon-Florio statute could potentially impact that balance. The conclusion then summarizes those changes that would be beneficial and those that would be detrimental to the Exon-Florio balance.

II. THE EXON-FLORIO STATUTE AND ITS LEGISLATIVE HISTORY

Understanding the recent controversies involving CFIUS and the subsequent proposals to change the Exon-Florio statute requires an appreciation for how the Exon-Florio process is currently structured and of the legislative history behind that structure. Exon-Florio has a highly relevant legislative history, and the development of the statute and the executive orders that implement it has been heavily influenced by outside events. As will be demonstrated, the legislative history of Exon-Florio and the manner in which it has been implemented reveal that a careful balance is maintained between national security and an open investment policy.¹⁹

A. *The Exon-Florio Process Today*

Exon-Florio gives the President or his designee—CFIUS—the authority to conduct an investigation regarding the possible impact on national security of mergers and acquisitions involving “foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States.”²⁰ The question of which transactions are covered by Exon-Florio is a complicated one, and has been addressed by Treasury in detail in the Code of Federal Regulations.²¹ These transactions, or CFIUS transactions, are almost always brought to the attention of CFIUS when one or both parties to a

¹⁹ See *infra* text accompanying notes 218–43.

²⁰ 50 U.S.C. app. § 2170(a) (2000). “Foreign persons” includes companies, not merely individuals, and is defined at 31 C.F.R. § 800.213 (2005). “Control” is defined at 31 C.F.R. § 800.204.

²¹ 31 C.F.R. §§ 800.301, 800.302. The question of what qualifies as a CFIUS transaction can be difficult, and of course is of concern to businesses hoping to complete a merger or acquisition. However, it is a legal question that is not directly relevant to the topic of this Note, and therefore will be left to others to explain.

transaction file a voluntary notice with the Committee.²² Treasury, as the chair of CFIUS, may reject these notices as incomplete and request that additional information be provided to the Committee before the commencement of a review.²³ Alternatively, a member of the CFIUS Committee may ask the Committee to consider a transaction which has not been voluntarily reported to the Committee by the parties; in such an event the parties are notified of the review and asked to submit information.²⁴ CFIUS does not consider a notice complete unless an actual transaction exists.²⁵

Once notice is complete, CFIUS has thirty days to conduct a "review" of the transaction for national security concerns.²⁶ CFIUS may consider a number of factors described in the statute to determine if the transaction may negatively impact national security.²⁷ If during this thirty day review the Committee finds that further review is necessary, then the Committee may initiate a forty-five-day investigation.²⁸ Such an investigation is mandatory in the event that the acquiring firm is "controlled by or acting on behalf of a foreign government" when the transaction "could result in control" of a U.S. company that "could affect . . . national security."²⁹ If an investigation is initiated, then a report must be made to the President regarding the views of the Committee, including dissenting views, on the matter of whether "there is credible evidence . . . to believe that the foreign interest exercising control

²² 31 C.F.R. § 800.401. Notices submitted by one party acting alone—usually a hostile bidder—are referred to as unilateral notices.

²³ 31 C.F.R. § 800.403.

²⁴ 31 C.F.R. § 800.401(b). Once three years have passed since the completion of a transaction, only the Chair of CFIUS may request a review. § 800.401(c). Therefore, there is technically no outer time limit to the possibility of a review after the completion of a transaction.

²⁵ CFIUS, as a matter of policy, does not issue advisory opinions. Thus, only completed transactions are eligible for review. Ron Orol, *CNOOC Pushes Pawn in Unocal Chess Match*, DAILY DEAL/THE DEAL, July 5, 2005, at 5 ("Such a [CFIUS] review, however, is contingent on companies striking a deal."); Robert Collier, *Backlash to Chinese Bid for Unocal; Bush Urged to Block Takeover Because of Energy, Security Fears*, S. F. CHRON., June 24, 2005, at A1 (Secretary of the Treasury John Snow states that a CFIUS review was "hypothetical at this point because we don't have a transaction"); Todd Bullock & Katie Xiao, *Bush Administration Says Review of Chinese Unocal Bid Premature; Unocal Shareholders to Vote on Offer from Chinese Oil Producer August 10*, FED. INFO. & NEWS DISPATCH, July 19, 2005 (stating that CFIUS does not begin reviews of potential mergers and acquisitions until a bid is accepted).

²⁶ 50 U.S.C. app. § 2170(a) (2000); 31 C.F.R. § 800.

²⁷ 50 U.S.C. app. § 2170(f).

²⁸ 50 U.S.C. app. § 2170(a).

²⁹ 50 U.S.C. app. § 2170(b). This provision was part of the Byrd Amendment to Exon-Florio. See *infra* text accompanying notes 117–120.

might take action that threatens to impair the national security” and whether any other provisions of law may provide relief,³⁰ other than the International Emergency Economic Powers Act.³¹ However, CFIUS may also permit a company to withdraw its filing, either during the thirty-day review or forty-five-day investigation phases, and re-file at a later date.³² Once the Committee’s report has been sent to the President, he has fifteen days to make his findings—on the same issues as were referred to him after the investigation—to take no action, to decide to block the transaction, (or to order divestiture if the transaction is already completed.)³³ Other important provisions of Exon-Florio, its implementing executive order, and the accompanying regulations are discussed when relevant in this Note.

B. CFIUS Before Exon-Florio

In 1975, President Gerald Ford signed Executive Order 11,858, which created the Committee on Foreign Investment in the United States.³⁴ At the time, the Committee consisted of six members³⁵ and was responsible for “monitoring the impact of foreign investment in the United States . . . and for coordinating the implementation of United States policy on such

³⁰ 50 U.S.C. app. § 2170(e).

³¹ *Id.* This Act allows the President to declare a national emergency in regard to a foreign state or other foreign entity, and is usually reserved for extreme situations. 50 U.S.C. §§ 1701–1706 (2000).

³² 31 C.F.R. § 800.505 (2005). This provision has recently been the subject of criticism. *See, e.g.,* U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW’S EFFECTIVENESS 1 (2005).

³³ 50 U.S.C. app. § 2170(d)–(e); 31 C.F.R. § 800.601.

³⁴ Exec. Order No. 11,858, 3 C.F.R. app. 159 (1976); Exec. Order No. 11,858, 3 C.F.R. (1971–1975), as amended.

³⁵ Two members were added to the pre-Exon-Florio CFIUS in 1980 by President Jimmy Carter, bringing the total membership to eight. Exec. Order No. 12,188, 3 C.F.R. 131 (1981). This number had not changed by the time Exon-Florio was passed in 1988. However, since that time additional members have been added. *See* Exec. Order No. 12,661, § 3-201(2)(F), 3 C.F.R. 618 (1989); Exec. Order No. 12,860, § 1, 3 C.F.R. 629 (1994); Exec. Order No. 13,286, § 57(a), 3 C.F.R. 166 (2003). Therefore, today the full membership of CFIUS includes: the Secretary of the Treasury (Chair), the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Secretary of Commerce, the United States Trade Representative, the Assistant to the President for National Security Affairs, the Chairman of the Council of Economic Advisers, the Director of the Office of Management and Budget, the Director of the Office of Science and Technology Policy, and the Assistant to the President for Economic Policy. *See* Exec. Order No. 11,858, 3 C.F.R. app. 159 (1976), as amended.

investment.”³⁶ Additionally, the Secretary of Commerce was charged with collecting and monitoring data on foreign investment in the United States that would be used by the Committee.³⁷ These provisions still exist today, even after numerous amendments to the original Executive Order.

Under Executive Order 11,858, CFIUS and the President did not have the authority to block transactions involving the takeover of U.S. companies by foreign persons or entities, but rather merely the authority to review such transactions in general.³⁸ However, when the Senate later held hearings on the possible passage of the Exon-Florio Amendment, several witnesses stated that the ability of this early CFIUS to review foreign mergers and acquisitions alerted the government to potential problems with individual transactions.³⁹ These problems were always resolved through the use of other statutory mechanisms, such as antitrust laws or the Department of Defense’s ability to require business restructuring when classified contracts were involved.⁴⁰

C. Passage of Exon-Florio

More than a decade after Executive Order 11,858 was issued, Congress passed the Omnibus Trade and Competitiveness Act of 1988.⁴¹ The House Committee Report for an early version of this Act described the Act as “represent[ing] the most comprehensive restructuring of basic U.S. trade policy since the Trade Act of 1974,” and as “a response to the serious decline in United States competitiveness and the rapid growth in our trade deficit.”⁴² The Act included the Exon-Florio Amendment to § 721 of the Defense Production Act of 1950.⁴³ Exon-Florio granted the President or his designee the power to review acquisitions of U.S. companies by foreign persons for

³⁶ Exec. Order No. 11,858, 3 C.F.R. app. 159 § 1(b) (1976).

³⁷ *Id.* § 2.

³⁸ *See id.* § 1.

³⁹ *See, e.g., Foreign Takeovers and National Security: Hearing on Section 905 of H.R. 3 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce, 100th Cong. 17–18 (1987) [hereinafter Foreign Takeovers Hearings]* (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

⁴⁰ *Id.*

⁴¹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988).

⁴² H.R. REP. NO. 100-40, pt. 1, at 2–3 (1987).

⁴³ Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. app. § 2170 (2000)).

national security concerns and, if necessary, to block those transactions or to order divestment if a transaction had already been completed.⁴⁴

1. Overview of Exon-Florio

The early bills that would eventually lead to the passage of Exon-Florio contained language that was far broader than that found in the final version of the Act. One early version of the Amendment, § 907 of House Bill 3,⁴⁵ gave the Secretary of Commerce the authority to review mergers, acquisitions, and takeovers, as well as joint ventures and licensing, to determine their effect on "national security, essential commerce, and economic welfare."⁴⁶ The Secretary was permitted to seek input from the

⁴⁴ "The President or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States." 50 U.S.C. app. § 2170(a) (2000). After an investigation is complete, the President "may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States . . . by or with foreign persons so that such control will not threaten to impair the national security." 50 U.S.C. app. § 2170(d).

Congress wrote into the statute a provision which prohibits courts from reviewing decisions by the President to block a transaction or to order divestiture of a company under Exon-Florio. 50 U.S.C. app. § 2170(e). This statutory bar on judicial review of CFIUS decisions explains why this Note contains no discussion of any case law directly addressing CFIUS issues, but rather only cases discussing constitutional issues which concern proposed changes to the statute. Those cases which do mention CFIUS or Exon-Florio tend to mention it in a passing manner while discussing other matters adjudicated in a merger or acquisition context. See *In re Chateaugay Corp.*, 155 B.R. 636 (Bankr. S.D.N.Y. 1993); *In re Chateaugay Corp.*, 186 B.R. 561 (Bankr. S.D.N.Y. 1995); *LTV Aerospace & Def. Co. v. Thomson-CSF, S.A.*, 198 B.R. 848 (Bankr. S.D.N.Y. 1996); *Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Afr.*, 713 F. Supp. 1457 (S.D.N.Y. 1989); *In re Global Crossing Ltd.*, 295 B.R. 726 (Bankr. S.D.N.Y. 2003); and *In re Global Crossing Ltd.*, 295 B.R. 720 (Bankr. S.D.N.Y. 2003). This bar on judicial review is certainly an uncommon provision in federal law. In the antitrust context, the DOJ and FTC use the Second Request process as a means of effectively cutting out the judiciary from the review process, yet there is no actual statutory bar to such review. See Matthew S. Bailey, Note, *The Hart-Scott-Rodino Act: Needing a Second Opinion About Second Requests*, 67 OHIO ST. L.J. 433, 440 (2006).

⁴⁵ Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100th Cong. § 907 (1987). This Act went through multiple revisions while being considered by Congress, like any bill. Therefore the numbering of individual sections may vary depending on the version of the bill being examined. For consistency purposes, this Note will refer to the version of the bill which numbered the Exon-Florio and Bryant Amendments (discussed below) as sections 907 and 704, respectively.

⁴⁶ *Id.* § 907(a).

Secretary of Defense and other principals, as well as to hold hearings.⁴⁷ After a forty-five-day investigation, the Commerce Secretary was to make his recommendation to the President, who could then block the transaction or take other appropriate action.⁴⁸ This early version of Exon-Florio expressly stated that the Secretary should consider factors relating not simply to national security, but also to “essential commerce.”⁴⁹

This early version of the trade bill also included section 704,⁵⁰ a provision referred to as the “Bryant Amendment,” named after its sponsor.⁵¹ This Amendment required all foreign entities or companies that acquired a “significant interest” or a “controlling interest” in a U.S. property or business to provide very detailed information to the Secretary of Commerce regarding the acquisition, the size of the interest acquired, the salaries of the foreign company’s top managers, and more, within thirty days of the acquisition.⁵²

The House Committee Report regarding House Bill 3 said that sections 704 and 907 were “designed to better enable our government to recognize and respond to threats to our economic security.”⁵³ The sponsors of section 704 argued that in light of the country’s large trade deficit, “there is only a limited picture of where this foreign capital is coming from and where it is going.”⁵⁴ The House Committee agreed that foreign investment is generally a good thing for the country, but argued that the large influence of foreign investors raised “long-range concerns regarding economic and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The full text on this matter stated:

[T]he Secretary [of Commerce] and the President shall further recognize the close relation of the economic welfare of the Nation to our national security and essential commerce, and shall take into consideration the impact of foreign control on the economic welfare of individual domestic industries, and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the control of such industries by foreign citizens shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security and essential commerce.

Id.

⁵⁰ *Id.* § 704.

⁵¹ See *Mergers and Acquisitions—Foreign Investments in the United States: Hearing Before the Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Fin. and Urb. Aff.*, 100th Cong. 4–6 (1987) [hereinafter *Mergers and Acquisitions Hearings*] (statement of Representative John Bryant (D-TX) describing his Amendment).

⁵² Trade and International Economic Policy Reform Act, H.R. 3, 100th Cong. § 704 (1987).

⁵³ H.R. REP. NO. 100-40, pt. 2, at 47 (1987).

⁵⁴ *Id.*

political independence and, ultimately, national security.”⁵⁵ The House Committee argued that the Bryant Amendment was necessary to gain such information because current sources were either incomplete or unavailable outside of the agencies doing the collection.⁵⁶

In justifying section 907 (which included not just national security, but “essential commerce” as a factor the President could protect), the House Committee used very similar arguments to those used to support section 704.⁵⁷ The Committee pointed to the proposed takeover of Fairchild Semiconductor by Fujitsu Corporation of Japan as an example of a takeover that, if it had actually occurred, would have hurt national security and essential commerce.⁵⁸ The Committee also argued that semiconductors were essential to the nation’s defense, and that their loss to a foreign country “would be tantamount to [the] loss of the ability to produce airplanes during World War II.”⁵⁹

In the dissenting views to the Conference Report, the Republican committee members said that the Bryant Amendment imposed “burdensome and unjustifiable reporting requirements for foreign investors,” which, if enacted, would “have an immediate, and possibly disastrous effect, on the current and future levels of foreign investment in the United States.”⁶⁰ They proceeded to say that if section 704 was left in the bill, they would urge Republicans in the House to vote against it and President Reagan to veto it.⁶¹ They also argued that the provision was unnecessary because the information that Congress really needed to make decisions in this area was readily available; the high level of detail asked of foreign investors would only succeed in scaring those investors away from the country.⁶²

In the Senate, an early version of Exon-Florio similar to the House’s section 907 was section 1401 of Senate Bill 1420.⁶³ The Senate version, like the House version, included “essential commerce” along with national security as a basis for review.⁶⁴ However, it established different procedures for the review: the Secretary of Commerce had responsibility for the process

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 48–49.

⁵⁸ *Id.* at 48.

⁵⁹ H.R. REP. NO. 100-40, pt. 2, at 48 (1987).

⁶⁰ *Id.* at 109.

⁶¹ *Id.* at 110.

⁶² *Id.* at 112.

⁶³ Omnibus Trade and Competitiveness Act of 1987, S. 1420, 100th Cong. § 1401 (1987). The Senate did not include a provision similar to the Bryant Amendment in its early version of the Omnibus Trade and Competitiveness Act.

⁶⁴ *Id.*

but could only initiate the review on the recommendation of a small number of executive branch officials, public hearings were discouraged, etc.⁶⁵ This provision introduced various criteria the President was to evaluate in making his decision after receiving the Secretary's report; such criteria were not included in the original House version.⁶⁶ The Senate version also excluded licenses and joint ventures from review.⁶⁷ Finally, unlike the House version, the Senate version added Exon-Florio as a new section to the Defense Production Act of 1950,⁶⁸ rather than introducing it as a free-standing provision.⁶⁹ The placement of Exon-Florio in the Defense Production Act, as opposed to a code section on trade, signified the decision of the provision's drafters and of Congress in general to ultimately limit Exon-Florio to the national security context.⁷⁰

2. *Objections to the Original Exon-Florio*

Objections to these original versions of Exon-Florio were raised by the Reagan Administration and various industry groups.⁷¹ The Reagan Administration initially argued that CFIUS, which at that time did not have enforcement powers, was a sufficient mechanism for dealing with threats to national security arising from corporate mergers because it could alert other sections of the government to potential problems.⁷² The government could then use existing laws to deal with the problem.⁷³ In his written testimony,

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Defense Production Act of 1950, 50 U.S.C. app. §§ 2061–2170, 64 Stat. 7989 (1950).

⁶⁹ Omnibus Trade and Competitiveness Act of 1987, S. 1420, 100th Cong. § 1401 (1987).

⁷⁰ See *infra* text accompanying notes 83–84.

⁷¹ See, e.g., *Foreign Takeovers Hearings*, *supra* note 39, at 20–24 (written testimony of David C. Mulford, Assistant Secretary of the Treasury for International Affairs); *Mergers and Acquisitions Hearings*, *supra* note 51, at 60–69 (written testimony of Robert L. McNeill, Executive Vice Chairman of the Emergency Committee for American Trade) (explaining that his organization, along with the National Association of Manufacturers, the National Foreign Trade Council, the U.S. Chamber of Commerce, and the U.S. Council for International Business, were concerned about the Exon-Florio legislation).

⁷² *Foreign Takeovers Hearings*, *supra* note 39, at 20–21. (written testimony of David C. Mulford, Assistant Secretary of the Treasury for International Affairs) (“I believe the process and existing laws are powerful, effective, and sufficient to protect our national interests.”).

⁷³ See *id.* at 20–21; see also *Foreign Takeovers Hearings*, *supra* note 39, at 17 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

Assistant Secretary of the Treasury for International Affairs David Mulford listed a number of cases where CFIUS review had been successful—without the formal enforcement power proposed in the Exon-Florio Amendment.⁷⁴ Thus, the Reagan Administration felt that giving the authority to review these transactions (with enforcement authority) to the Secretary of Commerce was duplicative of CFIUS's then-current functions.⁷⁵ The Administration also spoke out against the concept of an economic security review on the grounds that it was overly broad.⁷⁶ The Administration strongly supported an open policy regarding foreign direct investment, and thought that the economic security element of Exon-Florio would not only hurt the U.S. economy by discouraging foreign direct investment in the country, but could lead other countries to close their doors to foreign direct investment ("FDI") from the United States.⁷⁷

Industry groups, including the Business Roundtable, the Chamber of Commerce, and BP Oil, made essentially the same arguments in congressional hearings. A representative of these groups, Robert McNeill of the Emergency Committee for American Trade, said at the hearings that the national security goal of section 907 was "generally acceptable," but that the groups viewed the "essential commerce" and "economic welfare" goals with "great concern."⁷⁸ They argued that the original version of section 907 would cast a net that was too broad, by including economic security, licensing, and joint ventures.⁷⁹ He stated that business and industry groups favored the Senate version (Title XIV) to the House version (section 907) because it focused exclusively on national security, eliminated joint ventures and licensing from review, provided greater confidentiality to business information, and provided more leeway for the Secretary of Commerce to

⁷⁴ *Foreign Takeovers Hearings*, *supra* note 39, at 22–23 (written testimony of David C. Mulford, Assistant Secretary of the Treasury for International Affairs).

⁷⁵ *Foreign Takeovers Hearings*, *supra* note 39, at 18 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce). Mr. Farren also stated that the Administration felt it was unnecessary to involve the President in the process and that the proposed timetables for investigations were too short. *Id.*

⁷⁶ *Foreign Takeovers Hearings*, *supra* note 39, at 21–22 (statement of David C. Mulford, Assistant Secretary for International Affairs, Department of the Treasury) ("The alternative criteria of essential commerce, and economic welfare are so broad that virtually any contemplated investment could come under government scrutiny. This could open practically any foreign investment to investigation and political pressure.").

⁷⁷ *Id.* at 22–24.

⁷⁸ *Mergers and Acquisitions Hearings*, *supra* note 51, at 21 (statement of Robert L. McNeill, Executive Vice Chairman, Emergency Committee for American Trade) ("These are enormously broad and vague standards that are of great concern to us in business.").

⁷⁹ *Id.*

decide whether to undertake a review.⁸⁰ A representative of Newmont Mining, a gold mining company that was under much scrutiny in Exon-Florio and Bryant Amendment hearings, testified that “the phrase ‘essential commerce’ in Section 905 is inherently vague and imprecise,” could cover any transaction at all, and should be removed from the bill.⁸¹ These industry representatives spoke out perhaps even more forcefully against the Bryant Amendment.⁸²

Later, in response to a question from Senator Harkin, Senator Exon stated that his Amendment was “aimed specifically at national defense only.”⁸³ He went on to indicate that in order to get the support of the Reagan Administration, particularly the Treasury Department, he was willing to change the text of the Amendment to allow the President to choose which agency would implement Exon-Florio, rather than vesting it by statute in the

⁸⁰ *Id.* at 22–23. McNeill also pointed out that by placing Exon-Florio within the Defense Production Act, Congress would emphasize that the review power was focused on national security, rather than economic security. *Id.* at 23.

⁸¹ *Mergers and Acquisitions Hearings*, *supra* note 51, at 57 (written statement of Richard B. Leather, Executive Vice President, Newmont Mining Corporation).

⁸² *E.g.*, *Mergers and Acquisitions Hearings*, *supra* note 51, at 67–68 (written statement of Robert L. McNeill, Executive Vice Chairman, Emergency Committee for American Trade). These groups said that the Amendment was sure to put a chill on foreign investment in the United States. *Id.* They also pointed to the fact that similar information was already collected by the Departments of Commerce, Agriculture, and Treasury, as well as the SEC, and argued that this information should be sufficient for the government’s purposes. *Id.* at 67.

Rep. Bryant, the sponsor of § 704, argued in related hearings that “[e]xcessive foreign ownership in our energy and defense related industries could endanger our national security.” *Federal Collection of Information on Foreign Investment in the U.S.: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 100th Cong. 10 (1988) [hereinafter *Federal Collection Hearings*] (statement of Hon. John W. Bryant, U.S. Representative from Texas). He went on to discuss proposed acquisitions of U.S. oil companies by foreign companies in 1988. *Id.* at 14. These proposed acquisitions were presented in a negative light, immediately after Bryant had discussed both national and economic security. *Id.* However, he then said, “I don’t raise [those acquisitions] alone as an argument for this provision. I simply point to [them] as a reason why common sense would tell us that we need accurate data.” *Id.* Remember, this was in a discussion of section 704, not section 907.

Later, in an exchange between Bryant and Senator John Danforth (R-MO), Bryant indicated that his reporting requirements would allow policymakers to make determinations such as whether or not a foreign investor could purchase a U.S. oil company, because they would know “what percentage of the overall energy productive capacity of this country they represent.” *Id.* at 20. He indicated that he would be concerned if 100% of the oil industry were controlled by foreign investors. *Id.* at 20–21.

⁸³ *Federal Collection Hearings*, *supra* note 82, at 25 (statement of Sen. James J. Exon).

Secretary of Commerce.⁸⁴ He also indicated that the Exon-Florio Amendment would be focused on "national defense and national defense only," whereas section 704 was more "far-reaching," and he attempted to distance his proposal from that measure.⁸⁵

3. Conference Committee Revision and Final Version of the Amendment

The Conference Committee limited the review of mergers and acquisitions to those that involved national security concerns; economic security was removed from its version of Exon-Florio.⁸⁶ It should be noted, however, that "national security" was never defined by the statute. This conference version of the Exon-Florio Amendment was identical to the one that was ultimately passed, and was renumbered as section 5021 of the Omnibus Trade and Competitiveness Act.⁸⁷ Like the original Senate version, the Conference Committee added Exon-Florio to the Defense Production Act of 1950 as a new section.⁸⁸ The Conference Committee also completely removed the Bryant Amendment from the trade bill.⁸⁹

President Reagan vetoed H.R. 3 on other grounds.⁹⁰ However, the bill was not dead; after changes to other portions of the bill, Congress again sent the measure to the President, who signed the bill into law as the Omnibus Trade and Competitiveness Act of 1988.⁹¹ After enactment, the Exon-Florio Amendment was codified at 50 U.S.C. app. § 2170.⁹²

⁸⁴ *Id.* at 25.

⁸⁵ *Id.* at 25-26.

⁸⁶ *E.g.*, H.R. REP. NO. 100-576, at 925 (1988).

⁸⁷ *Id.* at 337-39.

⁸⁸ *Id.* at 337.

⁸⁹ *E.g.*, *id.* at 927-28. Apparently Republican threats to vote against the bill and to urge the President's veto were effective in that the Democratic sponsors agreed to remove the Bryant Amendment and made the other changes to Exon-Florio described above.

⁹⁰ President's Message to Congress Transmitting His Veto of H.R. 3, A Bill to Enhance the Competitiveness of American Industry, and for Other Purposes, H.R. DOC. NO. 100-200, at 1-2 (1988). President Reagan objected most of all to a provision in the trade bill that would have required companies conducting layoffs of employees to notify those employees a certain amount of time in advance. *Id.*

⁹¹ Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. app. § 2170 (2000)).

⁹² 50 U.S.C. app. § 2170 (2000).

D. Amendments to the Executive Order

After Exon-Florio became law, the President issued a temporary memorandum delegating his powers under the statute to the Secretary of the Treasury.⁹³ This temporary arrangement, however, was soon superseded with the issuance of Executive Order 12,661, which amended President Ford's original executive order authorizing CFIUS.⁹⁴ In this executive order the President permanently delegated his authority to examine transactions for national security concerns under Exon-Florio to CFIUS.⁹⁵ The majority of Executive Order 11,858 was left intact—the review and analysis functions of CFIUS—with the major change simply being the addition of the President's statutory authority to block a transaction directly or order divestment based on CFIUS's recommendation.⁹⁶ The executive order also established the procedures that are still in place today for the review of a CFIUS transaction.⁹⁷ Finally, Executive Order 12,661 added two members to CFIUS, and stated that the secretaries listed in the statute, not their designees, would be the members of the Committee.⁹⁸

E. Amendments to Exon-Florio

Congress has made or considered making statutory changes to section 2170 on a number of occasions; some of these changes have been more significant than others and are more relevant to the topic of this Note.⁹⁹ In 1991, Congress attempted to amend Exon-Florio in a variety of ways with House Bill 2624.¹⁰⁰ These changes included taking much of the authority to

⁹³ Presidential Memorandum, included with 50 U.S.C. app. § 2170.

⁹⁴ Exec. Order No. 12,661, 3 C.F.R. 618 (1989).

⁹⁵ *Id.* This delegation of presidential authority is specifically authorized by the Exon-Florio statute. 50 U.S.C. app. § 2170(a).

⁹⁶ Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

⁹⁷ *Id.*

⁹⁸ *Id.* § 3-201(1)(A), (F).

⁹⁹ One "minor" yet important change occurred with the passage of Pub. L. No. 102-99, which reinstated the Defense Production Act of 1950 after it lapsed on October 20, 1990. *See* Defense Production Act Extension and Amendments of 1991, Pub. L. No. 102-99, § 8, 105 Stat. 487, 490 (1991). This Act also gave the Exon-Florio section of the Defense Production Act permanent status; unlike the rest of the Defense Production Act, Exon-Florio does not need to be re-authorized on a regular basis. *See id.*

¹⁰⁰ *Foreign Direct Investment, the Exon-Florio Foreign Acquisition Review Process, and H.R. 2624, the Technology Preservation Act of 1991, to Amend the 1988 Exon-Florio Provision: Hearings Before the Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Fin. and Urb. Aff.*, 102d Cong., 2d Sess. (1992) [hereinafter *Foreign Direct Investment Hearings*].

block transactions away from the President and giving it to the Secretary of Commerce,¹⁰¹ as well as providing for "[m]andatory notice for transactions involving export licenses and classified information, authority for assurances and review of those assurances, expansion of the scope of transactions to include other business accommodations . . . and limiting the President's flexibility and execution of the law."¹⁰² The Administration of President George H. W. Bush argued strongly against these changes, and the President even threatened a veto of this bill on the grounds that the CFIUS process worked effectively as it was then constructed, that the changes were confusing, and that the changes would harm foreign direct investment in the U.S.¹⁰³ The full text of H.R. 2624, which was not adopted by Congress and did not become law, can be found in the transcript of the hearings on the bill.¹⁰⁴

Soon after the 1992 hearings described above, Congress was intensely interested in the CFIUS review of the proposed acquisition of LTV Steel's Missile Division by Thomson-CSF, a corporation owned by the French government.¹⁰⁵ Congress held several hearings that touched on concerns regarding the Thomson/LTV deal.¹⁰⁶ In one hearing, Senator Exon emphasized that since the passage of Exon-Florio, there had been 700 preliminary investigations conducted by CFIUS, of which only thirteen moved to the investigation phase, and only one of which the President took action against a transaction.¹⁰⁷ Exon then stated that the President had used

¹⁰¹ *E.g.*, *id.* at 15 (statement of Rep. James Nussle).

¹⁰² *Id.* at 3 (statement of William E. Barreda, Deputy Assistant Secretary for Trade and Investment Policy, U.S. Department of the Treasury).

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.* At hearings on this bill, Dr. Susan Tolchin criticized how the Exon-Florio process was then operating and suggested changes, including the addition of economic competitiveness and the transformation of CFIUS into a regulatory commission. *Foreign Acquisitions of U.S. Owned Companies: Hearings Before the Subcomm. on Int'l Fin. and Monetary Pol'y of the S. Comm. on Banking, Housing and Urban Affairs*, 102d Cong. 22-23 (1992) [hereinafter *Foreign Acquisitions Hearings*] (statement of Susan J. Tolchin, Professor of Public Administration, George Washington University). Neither of these ideas gained any traction in Congress.

¹⁰⁵ See *infra* text accompanying notes 144-57.

¹⁰⁶ See, e.g., *Department of Defense Authorization for Appropriations for Fiscal Year 1993 and the Future Years Defense Program: Hearing Before the Subcomm. on Def. Industry and Tech. of the S. Comm. on Armed Services*, 102d Cong. 228 (1992) [hereinafter *Department of Defense Hearings*]; *Sale of LTV Missile and Aircraft Divisions, Hearings Before the Investigations Subcomm. of the H. Comm. on Armed Services*, 102d Cong, 2d Sess. 1 (1992) [hereinafter *Sale of LTV Hearings*].

¹⁰⁷ *E.g.*, *Pending Transactions Under the Exon-Florio Amendment: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 1 (1992) [hereinafter *Pending Transactions Hearings*] (statement of James J. Exon, U.S. Senator

his Exon-Florio authority less aggressively than Exon would have preferred, but still within the bounds of what he expected when drafting the statute.¹⁰⁸ Senator Lloyd Bentsen (D-TX) also spoke out against the Thomson/LTV transaction. He argued that sales of U.S. weapons manufacturers to state-owned foreign buyers should be banned.¹⁰⁹ He also emphasized that state-owned companies are not bound by the same free market forces as private companies.¹¹⁰ This distrust of state-owned companies gave fuel to the Byrd Amendment, which is discussed below.

Finally, it should also be noted that during his testimony before a congressional committee in March of 1992, Deputy Assistant Secretary of the Treasury William Barreda explained that both Congress in passing the Exon-Florio statute and Treasury in its CFIUS regulations chose to leave national security undefined.¹¹¹ He stated "we have not defined national security. I think the intent of Congress was very clear, that national security should be looked at in a broad sense" and that defining national security would have provided foreign entities and sophisticated lawyers a chance to structure transactions so as to get around the definition.¹¹² Similar sentiments were expressed by the Acting General Counsel of the Department of Defense, Chester Paul Beach, Jr., at a hearing on June 4, 1992,¹¹³ and can be found elsewhere in the CFIUS legislative history and in numerous analyses of Exon-Florio.

Concern over the national security implications of takeovers such as the Thomson/LTV case led to further legislative efforts to amend Exon-Florio. One House bill would have required the President to prohibit all CFIUS transactions unless the Secretary of Defense approved the sale.¹¹⁴ A Senate bill would have prohibited acquisitions of U.S. defense contractors by foreign government-owned corporations.¹¹⁵ After going through the Conference Committee, these provisions were dropped.¹¹⁶

from Nebraska). The one case in which the President took action referenced by Exon was the CATIC/MAMCO transaction. *See infra* text accompanying notes 140–43.

¹⁰⁸ *Pending Transaction Hearings*, at 2.

¹⁰⁹ *Id.* at 3 (statement of Sen. Lloyd Bentsen).

¹¹⁰ *Id.*

¹¹¹ *Foreign Direct Investment Hearings*, *supra* note 100, at 12.

¹¹² *Id.*

¹¹³ *Foreign Acquisitions Hearings*, *supra* note 104, at 54 (statement of Chester Paul Beach, Jr., Acting General Counsel of the Department of Defense).

¹¹⁴ H.R. REP. NO. 102-966, at 730 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1769, 1821.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Eventually, these negotiations led to the passage of the "Byrd Amendment" to Exon-Florio, contained within the National Defense Authorization Act for Fiscal Year 1993.¹¹⁷ Senator Robert Byrd (D-WV), on introducing his amendment, stated that he was dissatisfied with the Reagan and Bush Administrations' enforcement of Exon-Florio, and offered his amendment as a way of tightening the CFIUS review process.¹¹⁸ He expressly tied his consternation with how Exon-Florio was being enforced with respect to the Thomson/LTV case, arguing that his amendments would improve that enforcement and allow Congress to gain additional information on the workings of the CFIUS process.¹¹⁹ The Byrd Amendment added a section which would require mandatory investigations for acquisitions of U.S. companies by foreign state-owned enterprises—clearly a response to the attempt by the state-owned Thomson to acquire LTV.¹²⁰

Time has shown, however, that the Byrd Amendment has had little actual effect on the Exon-Florio framework or process. This is due to the fact that under § 2170(b), CFIUS still has the discretion to determine whether a company is truly "acting on behalf of" a foreign government or whether the transaction "could result in control" that "could affect national security" before beginning the investigation.¹²¹ The Amendment also added the following provisions: new factors the President should take into consideration when reviewing a CFIUS transaction, such as the possibility that critical U.S. technology could end up in the hands of various countries identified by the State Department as state sponsors of terrorism; a requirement for a report to Congress on each CFIUS decision made by the President; and a provision relating to technology risk assessment.¹²²

¹¹⁷ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (1992) (codified at 50 U.S.C. app. § 2170(b) (2000)). The Conference Committee's explanation of the provisions contained in the Byrd Amendment can be found at H.R. REP. NO. 102-966, at 730.

¹¹⁸ 138 CONG. REC. S25,878, 25,948 (1992).

¹¹⁹ *Id.* at 25,948–49. Other supporters of the bill made similar statements. *Id.* at 14,051–53 (including supporting statements by Senators James Exon (D-NE), Don Riegle (D-MI), and Paul Sarbanes (D-MD), as well as an initial endorsement by Senator John Warner (R-VA)).

¹²⁰ § 837(a), 106 Stat. at 2464.

¹²¹ Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?*, 9 AM. U. J. INT'L L. & POL'Y 417, 430 (1994); § 837, 106 Stat. at 2463–65. CFIUS presumably used this rationale to avoid the Byrd Amendment's required forty-five-day investigation of state-owned DPW in 2006. In Appendix B of the CFIUS regulations there is a useful discussion of the impact of the 1992 addition of § 2170(b), "Mandatory Investigations." 31 C.F.R. § 800 app. B (2000).

¹²² § 837, 106 Stat. 2315. The Byrd Amendment also called on the President to add two new members to CFIUS, the Director of the Office of Science and Technology Policy and the Assistant to the President for National Security Affairs. *Id.* President Bill

Later that same month, Congress added a requirement to Exon-Florio that CFIUS provide a quadrennial report on foreign investment in the United States to the Congress.¹²³ This report would include information not only on CFIUS's activities, but also on industrial espionage.¹²⁴ Senator Riegle (D-MI), who introduced this provision in the Senate, stated that its purpose was "to provide the Congress with a better understanding of these concerns so that it can adequately oversee executive branch administration of § 721."¹²⁵ The most recent amendment to Exon-Florio came in 1994, when Congress amended the statute to require that these quadrennial reports also include information on industrial espionage activities "directly assisted" by foreign governments, as opposed to the previous requirement that these reported-on activities be those "directed" by foreign governments.¹²⁶

F. CFIUS Regulations

The Department of the Treasury has issued a number of regulations regarding CFIUS and its operation.¹²⁷ These regulations provide definitions, deal with issues such as prior acquisitions, detail what transactions are and are not covered by § 2170, provide procedures for voluntarily notifying CFIUS of relevant transactions, flesh out the actual process that CFIUS must follow, and provide for confidentiality of corporate information.¹²⁸ While it is unnecessary to review each of these regulations in this Note, the regulations do include several sections that shed light on the meaning of various CFIUS provisions and their legislative histories. These are relevant to the current effort to make changes to the Exon-Florio process.

Of particular note is the discussion in Appendix A to the CFIUS regulations.¹²⁹ This appendix discusses the various proposals and public comments that went into the drafting of the Part 800 regulations, including the debate over the definition of national security.¹³⁰ Various requests were

Clinton subsequently added these two positions, as well as the Director of the Office of Management and Budget, to CFIUS's membership by executive order. Exec. Order No. 12,860, 58 Fed. Reg. 47,201 (Sept. 3, 1993). For a discussion of this and one subsequent addition of a member to CFIUS, *see supra* note 35.

¹²³ Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 163, 106 Stat. 4198, 4219-20 (1992).

¹²⁴ *Id.*

¹²⁵ 138 CONG. REC. 34,352, at 34,353 (1992).

¹²⁶ Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 809(d), 108 Stat. 3423, 3454 (1994).

¹²⁷ 31 C.F.R. § 800 (2005).

¹²⁸ *See generally id.*

¹²⁹ 31 C.F.R. § 800 app. A, § II (2005).

¹³⁰ *Id.*

made to Treasury to define national security in the mergers and acquisitions context by positive or negative lists, or by creating a multi-factor test.¹³¹ However, Treasury rejected these suggestions because they were too limiting on the President's ability to affirmatively act to protect national security, and provided insufficient guidance to corporations; rather, Treasury stated that "national security" should be "interpreted broadly and without limitation to particular industries."¹³² The Committee also refused to issue guidelines outside of the Code of Federal Regulations to generally describe national security, or to issue summaries of its decisions.¹³³ The issuance of summaries of the results of completed reviews, in particular, would have been harmful, Treasury argued, because CFIUS decisions are largely based on classified information provided by American intelligence agencies and confidential corporate information which must be protected under § 2170.¹³⁴ Finally, the Committee also rejected bright-line tests for determining what transactions are covered by CFIUS.¹³⁵

III. CASE STUDIES OF PROMINENT EXON-FLORIO TRANSACTIONS

The Exon-Florio statute contains a confidentiality provision which prevents detailed information on transactions reviewed by CFIUS from being made public or from being revealed under a Freedom of Information Act request.¹³⁶ While the statute also requires that CFIUS share information on

¹³¹ *Id.*

¹³² The following text from Appendix A is highly instructive on Treasury's approach to the lack of a definition of national security:

As is made clear in the principal legislative history . . . the focus of Section 721 is on transactions that could threaten to impair the national security. Although neither the statute nor the Conference Report defines national security, the conferees explain that it is to be interpreted broadly and without limitation to particular industries. . . . Ultimately, under section 721 and the Constitution the judgment as to whether a transaction threatens national security rests within the President's discretion.

. . . .

The regulations contemplate that persons considering transactions will exercise their own judgment and discretion in determining whether to give notice to the Committee with respect to a particular transaction.

Id.

¹³³ *Id.*

¹³⁴ *Id.*; see also *infra* text accompanying notes 136–39.

¹³⁵ 31 C.F.R. § 800 app. A, § II.

¹³⁶ 50 U.S.C. app. § 2170(c) (2000) ("Any information or documentary material filed with the President or the President's designee . . . shall be exempt from disclosure

specific transactions with Congress,¹³⁷ the sharing of this information is usually done in closed-door meetings so as to avoid a conflict with the confidentiality provision.¹³⁸ Therefore, much of the information which is in the public domain regarding individual CFIUS transactions is incomplete and is often provided by the very companies which are involved in the transactions.¹³⁹ Because of these restrictions on the flow of information, most of the detailed information the public has on the specifics of transactions covered by CFIUS is from those transactions which prompted widespread public or congressional attention: the Thomson/LTV transaction, the CATIC/MAMCO transaction, the CNOOC/Unocal transaction, and the DPW/P&O transaction. An analysis of these transactions, and an appreciation of the process which similar but less high-profile transactions face, are essential to understanding how the Exon-Florio statute has traditionally been implemented and why changes to the statute have been proposed.

A. CATIC/MAMCO Transaction

In 1990, MAMCO Manufacturing, an American aircraft parts manufacturer based in Seattle, Washington, was acquired by the China International Trust & Investment Corporation ("CATIC"), a company which had strong ties to the People's Liberation Army of the People's Republic of China.¹⁴⁰ While a voluntary notice of the transaction had been filed by CATIC with CFIUS before the transaction was finalized, the deal was

under [the Freedom of Information Act], and no such information . . . may be made public . . .").

¹³⁷ *Id.* ("Nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any . . . committee or subcommittee of the Congress.").

¹³⁸ See, e.g., *Dubai Purchase of U.S. Port Facilities, Hearings Before the Subcomm. on Domestic and Int'l Monetary Pol'y, Trade and Tech. of the H. Fin. Services Comm.*, 109th Cong. (2006), available at LEXIS CQ Congressional Testimony Database [hereinafter *Dubai Purchase Hearings*] (prepared statement of Deputy Secretary of the Treasury Robert Kimmitt).

¹³⁹ Companies involved in mergers, acquisitions, or takeovers often issue press releases which mention intent to file with CFIUS or state that the transaction has already been approved by CFIUS. See, e.g., *Hampson Industries Gets US Approval to Buy Coast Composites*, AFXNEWS.COM, Dec. 6, 2005, available at LEXIS News & Business Database; Stephanie Kirchgaessner, *CFIUS Gives Toshiba Nod over Westinghouse Deal*, FIN. TIMES (London), June 5, 2006, at 28 (stating that "[p]eople familiar with the transaction" had confirmed that CFIUS approved Toshiba's acquisition of Westinghouse).

¹⁴⁰ THE U.S. HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON U.S. NATIONAL SECURITY, *PRC ACQUISITION OF U.S. TECHNOLOGY* 44-45 (1999), available at <http://www.house.gov/coxreport/pdf/ch1.pdf> [hereinafter "COX COMMITTEE REPORT"].

completed before CFIUS's review was finished. After CFIUS's review, investigation, and a unanimous CFIUS recommendation regarding national security concerns, President George H. W. Bush ordered the divestiture of MAMCO by CATIC on the grounds that national security was threatened by CATIC's ties to the Chinese military, the fact that CATIC would gain "unique access" to U.S. aerospace companies through its ownership of MAMCO, and that some of the technology produced by MAMCO was export-controlled.¹⁴¹ The Administration also rejected efforts by CATIC to sell MAMCO to another Chinese company which had similar ties to the Chinese government.¹⁴²

The CATIC/MAMCO transaction remains the only transaction that has ever been formally blocked by a U.S. President after a negative recommendation from CFIUS.¹⁴³

B. Thomson/LTV Transaction

In 1992, Congress and the American media focused a great deal of attention on another CFIUS transaction, generating perhaps the largest amount of news coverage of any CFIUS transaction prior to the CNOOC transaction in 2005. Thomson-CSF, Inc., a French state-owned company, participated in a complicated and contentious bidding process for the right to acquire LTV Corporation, an American steel company that also owned an

¹⁴¹ *Id.* at 45; see also Andrew Rosenthal, *Bush, Citing Security Law, Voids Sale of Aviation Concern to China*, N.Y. TIMES, Feb. 3, 1990, at 1. Though these were the official reasons stated by the Bush Administration for the divestiture order, some have pointed to another possible motivation: the massacre by the Chinese government of dissidents in Tiananmen Square had only recently occurred, and the administration wished to express its disapproval to the Chinese government by denying it access to the technology it wished to gain from MAMCO. George Graham, *Thomson Tries to Reframe Bid for US Missile Maker*, FIN. TIMES (London), July 7, 1992, at 6.

¹⁴² COX COMMITTEE REPORT, *supra* note 140, at 45–46.

¹⁴³ *E.g.*, Organization for International Investment, Fact Sheet on Foreign Investment in the United States (CFIUS), July 2005, <http://www.ofii.org/factsheet.htm>; *Dubai Purchase Hearings*, *supra* note 138 (statement of Robert Kimmitt, Deputy Secretary of the Treasury). This statistic—often cited by critics of CFIUS—however, is misleading. In fact, the full impact of the CFIUS process should be measured based on the transactions that do not occur because companies know in advance they will not receive CFIUS approval and so do not attempt a transaction, as well as by the number of companies that decide to drop their bids after learning that a negative recommendation to the President by CFIUS is likely. This recently occurred when an Israeli company, Check Point Software Technologies, Ltd., dropped its bid to acquire an American software security technology company, Sourcefire, Inc. Ran Dagoni, *Analysts Check Point-Sourcefire Deal Was Doomed*, GLOBAL NEWS WIRE – ASIA AFRICA INTELLIGENCE WIRE, Mar. 27, 2006, at 1.

aerospace division.¹⁴⁴ This bidding war pitted Thomson, partnered with the Carlyle Group, a well-connected American investment company, against Martin Marietta, an American aerospace company which would later merge with Lockheed to form Lockheed Martin.¹⁴⁵ The details of the bidding process were a textbook example of the complexities of the mergers and acquisitions process, even prior to the involvement of CFIUS and Congress.¹⁴⁶ Ultimately, Thomson and Carlyle's bid was selected, and the companies planned for Thomson to acquire the LTV Missile Division and Carlyle to acquire the LTV Aircraft Division.¹⁴⁷ Once the deal was completed with LTV, the transaction needed to gain CFIUS approval. Thomson filed a voluntary notice with CFIUS regarding the proposed transaction, and on April 21, 1992, CFIUS began its initial thirty-day review of the transaction.¹⁴⁸

Prior to initiating the CFIUS review, Thomson failed to develop plans in conjunction with the Department of Defense in order to mitigate any concerns relating to the missile division, which held classified DOD contracts.¹⁴⁹ Martin Marietta exploited the concerns which clearly arose from this situation as a means of fighting the Thomson takeover.¹⁵⁰ Martin Marietta and other concerned parties argued that Thomson's acquisition of LTV was a clear national security concern, pointing to the fact that Thomson had sold weapons to Iraq in the past, thus raising the specter that LTV's technology could also find its way, at Thomson's direction, to America's enemies.¹⁵¹ Multiple hearings were held on Capitol Hill, putting political pressure both on Thomson and on CFIUS.¹⁵² The Department of Defense conducted extensive negotiations with Thomson regarding potential

¹⁴⁴ Robert N. Cappucci, Note, *Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism?*, 16 FORDHAM INT'L L.J. 652, 666-67 (1993).

¹⁴⁵ W. Robert Shearen, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 Hous. L. Rev. 1729, 1763 n.241 (1993). Ironically, it was actually a bankruptcy court which selected the Thomson/Carlyle bid over the Marietta bid, thus prompting the public and congressional uproar discussed above. *Id.*

¹⁴⁶ See, e.g., *Chronology of the Sale of LTV's Defense Units*, AEROSPACE DAILY, Aug. 12, 1992, at 253.

¹⁴⁷ Cappucci, *supra* note 144, at 667.

¹⁴⁸ *Chronology of the Sale of LTV's Defense Units*, *supra* note 146, at 254.

¹⁴⁹ See *id.* at 253.

¹⁵⁰ Graham, *supra* note 141, at 6.

¹⁵¹ See, e.g., Brian Bremner, *They Don't Let Just Anyone Buy a Defense Contractor*, BUS. WK., July 20, 1992, at 41 ("The U. S. defense Establishment carried out a blistering behind-the-scenes assault on Thomson over its status as a French government holding and its past business dealings with Iraq.").

¹⁵² See *supra* notes 106-07.

mitigation agreements but ultimately no agreement was reached and the DOD expressed its desire that the transaction simply not occur.¹⁵³ The strong opposition of the DOD was to be expected, because Thomson had provided Iraq with radar equipment for use during the Persian Gulf War and because the Defense Intelligence Agency found that the Thomson/LTV transaction presented greater security risks than any of over 200 such transactions that it had reviewed.¹⁵⁴

Ultimately, Thomson withdrew its bid for LTV's missile division, probably after learning that CFIUS would recommend to President George H. W. Bush that he block the transaction. However, one effect of the confidentiality of the CFIUS process is that it is somewhat unclear exactly what transpired in this case. Some reports indicate that CFIUS voted to recommend that the President block the transaction, but Thomson withdrew its bid before the recommendation was sent to the President.¹⁵⁵ Other sources say that Thomson withdrew in the face of a likely negative recommendation.¹⁵⁶ Still others maintain that CFIUS was prepared to approve the acquisition, but only under very stringent national security controls that Thomson could not accept, leading Thomson to withdraw its bid.¹⁵⁷

C. CNOOC/Unocal Transaction

In the summer of 2005, the third largest state-owned Chinese oil company, the China National Offshore Petroleum Company, Ltd. ("CNOOC") announced it would attempt to acquire Unocal, an American oil company that owned oil reserves around the world.¹⁵⁸ Unocal was already in the midst of negotiations with Chevron, another American oil company,

¹⁵³ See, e.g., Cappucci, *supra* note 144, at 667–68.

¹⁵⁴ Theodore H. Moran, *Foreign Acquisitions of Critical U.S. Industries: Where Should the United States Draw the Line?*, WASH. Q., Spring 1993, at 61, 69.

¹⁵⁵ Cappucci, *supra* note 144, at 667–68.

¹⁵⁶ "Negative recommendation" can be found at Graham, *supra* note 141. "Likely negative recommendation" can be found at *Chronology of the Sale of LTV's Defense Units*, *supra* note 146, at 254.

¹⁵⁷ "Stringent controls required for approval" can be found in a paper issued by the RAND Foundation. MARK A. LORELL ET AL., GOING GLOBAL? U.S. GOVERNMENT AND THE DEFENSE AEROSPACE INDUSTRY 173-74 (RAND Corp. 2002), available at http://www.rand.org/pubs/monograph_reports/2005/MR1537.pdf.

¹⁵⁸ Ron Orol, *Spooked by CNOOC*, 12 CORP. COUNS., Oct. 2005, at 94 [hereinafter Orol, *Spooked by CNOOC*].

which had offered \$16.4 billion to purchase Unocal.¹⁵⁹ CNOOC offered a higher bid of \$18.5 billion.¹⁶⁰

Negative congressional reaction to the proposed acquisition was evident almost immediately. Numerous members of Congress wrote letters to Secretary of the Treasury John Snow urging that the transaction be reviewed and blocked by CFIUS due to the national security concerns they saw associated with China, a Communist regime, gaining control of an American company with extensive oil reserves.¹⁶¹ Various members of Congress, as well as prominent commentators, raised serious arguments that in light of U.S. dependence on foreign oil, rising oil prices, and China's increasing military, political, and economic strength, it would be irresponsible for the country to permit China to acquire an American oil company.¹⁶²

¹⁵⁹ Collier, *supra* note 25, at A14.

¹⁶⁰ Orol, *supra* note 25, at 5.

¹⁶¹ See, e.g., Grassley, *CNOOC-Unocal Deal*, *supra* note 9 (joint press release with Sen. Max Baucus of Montana) (including the text of the Grassley-Baucus letter calling for CFIUS's careful review); Collier, *supra* note 25, at A14 (listing lawmakers who wrote to President Bush urging that he block the CNOOC transaction). It should also be noted that the CNOOC/Unocal transaction was not the first to originate in China which raised national security concerns in the United States. For example, in 2003, Hutchison Whampoa Ltd., a Hong Kong-based company, was forced to withdraw its \$250 million bid to acquire Global Crossing Ltd. after realizing that CFIUS would not approve its transaction due to concerns of the Department of Defense that Hutchison Whampoa had ties to the Chinese military and thus the transfer of control of a U.S. company with sophisticated telecommunications technology would be a threat to national security. See James A. Lewis, *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*, 57 FED. COMM. L.J. 457, 468-69 (2005); Orol, *Spooked by CNOOC*, *supra* note 158.

¹⁶² Editorial, *National Security, China and the Unocal Deal*, WASH. TIMES, July 5, 2005, at A18 (discussing generally the oil and national security link in this context). While most commentary focused on oil, some critics of the CNOOC transaction also referenced the fact that Unocal owned the only remaining rare earth minerals mine in the United States. *The National Security Implications of the Possible Merger of the China National Offshore Oil Corporation with Unocal Corporation: Hearings Before the H. Armed Services Comm.*, 109th Cong. (2005), available at LEXIS CQ Congressional Testimony Database [hereinafter *National Security Implications Hearings*] (statement of Frank Gaffney, Jr., President and CEO, Center for Security Policy), prepared remarks available at <http://www.centerforsecuritypolicy.org/GaffneyChinaTestimonyf7122.pdf>. That mine currently is not operating, leaving China as the supplier of eighty-eight percent of the world's rare earth minerals. *Id.* Interestingly (or perhaps disturbingly), two Chinese companies, San Huan New Materials and China Non-Ferrous Materials, acquired Magnequench, an Indiana-based manufacturer of eighty-five percent of the U.S. military's rare-earth magnets, in 1995. David Lague, *China Corners Market in a High-Tech Necessity*, INT'L HERALD TRIB., Jan. 22, 2006, at 11, available at <http://www.iht.com/articles/2006/01/22/business/rare.php>. After promising to keep Magnequench's production in the United States, China slowly moved the company to

It was at this point that various members began to introduce legislation that would have prevented the transaction.¹⁶³ Hearings were held in which both the CNOOC transaction and potential changes to the Exon-Florio statute were discussed.¹⁶⁴ CNOOC had originally claimed that it was confident it would win CFIUS approval and even secured approval from the Chinese government to raise its bid price from the original \$67 per share to \$69 per share.¹⁶⁵ Further, the Chinese Foreign Ministry expressed that government's disapproval of any U.S. attempt to block the transaction.¹⁶⁶ Despite this, CNOOC ultimately withdrew its bid, clearing the way for Chevron to acquire Unocal.¹⁶⁷ The increased attention paid to CFIUS, and specifically to Treasury's leadership of the Committee, provided the impetus for various members of Congress to continue to introduce bills designed to change the Exon-Florio legislative framework even after this withdrawal.¹⁶⁸

D. Dubai Ports World/P&O Transaction

In January 2006, all twelve CFIUS member agencies gave their approval for Dubai Ports World ("DPW"), a company owned by the Emir of Dubai, one of the member states of the United Arab Emirates, to acquire Peninsular

China. *Id.* (quoting Sen. James Inhofe). Today, the United States does not have a domestic rare earth mineral supplier for critical defense-related magnets. *Id.* In early 2006, the U.S. Department of Energy released a report stating that the largest—or even only—national security concern arising out of the CNOOC attempt to acquire Unocal was related to the U.S. company's rare earth mining operations. *False Alarm on US Oil: But the All-Clear is Too Late for China and Unocal Investors*, FIN. TIMES (London), Feb. 9, 2006, at 14.

¹⁶³ A number of different proposals to stop the transaction were submitted, including one that would have required the Secretaries of Defense, Energy, and Homeland Security to review the transaction and to give their approval in order for it to proceed. See, e.g., *Legislation Would Require Extra Review of CNOOC Bid*, WASH. POST, July 26, 2005, at D2. This approval would have been in addition to that required from CFIUS. *Id.*

¹⁶⁴ See Orol, *Spooked by CNOOC*, *supra* note 158, at 94.

¹⁶⁵ Ben White, *Unocal Reveals Portrait of Negotiations; Chief Executive Said CNOOC Could Beat Chevron With Higher Bid*, WASH. POST, July 26, 2005, at D1.

¹⁶⁶ Chris Baker, *China Tells U.S. Not to Meddle in Bid for California Oil Giant*, WASH. TIMES, June 30, 2005, at A1. The Chinese Foreign Ministry made statements directed toward the Congress—warning it to leave the deal alone—that were far more confrontational than one would normally expect from diplomats, and that some members of Congress considered inappropriate. *Id.* at A11. Therefore, Congress was not the only political body trying to use its weight to affect the outcome of the battle between CNOOC and Chevron to acquire Unocal.

¹⁶⁷ David Barboza & Andrew Ross Sorkin, *Chinese Company Drops Bid to Buy U.S. Oil Concern*, N.Y. TIMES, Aug. 3, 2005, at A1.

¹⁶⁸ Corr, *supra* note 11, at 38.

and Oriental Steam Navigation Company (“P&O”) in a \$6.8 billion deal.¹⁶⁹ P&O, a British company, operates port terminals in countries around the world, including the United States.¹⁷⁰ This acquisition would have given DPW operational control—not ownership—of eleven terminals in six U.S. ports.¹⁷¹

The Treasury Department explained that each of the twelve CFIUS member agencies conducted its own independent reviews of the proposed transaction; additionally, CFIUS invited the Departments of Transportation and Energy to take part in the review process.¹⁷² Treasury also explained that an intelligence assessment of the impact of the DPW acquisition of P&O was provided by U.S. intelligence agencies.¹⁷³ Perhaps even more interestingly, the Administration revealed some of the details of mitigation agreements that had been negotiated with DPW prior to CFIUS’s decision not to undertake a formal forty-five-day investigation.¹⁷⁴ These mitigation measures were put into place after a representative of the Department of Homeland Security raised concerns about the deal; once the measures were put into place, DHS dropped its objections to allowing the deal to proceed.¹⁷⁵ While not all of the mitigation measures were made public, one that was revealed involved a commitment by DPW to cooperate with any future investigations by the U.S. government of the firm’s port operations.¹⁷⁶

¹⁶⁹ Press Release, U.S. Dep’t of the Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), <http://www.treas.gov/press/releases/js4071.htm> [hereinafter Department of the Treasury Press Release Feb. 24, 2006]. Such a public acknowledgement of a CFIUS approval is unusual for CFIUS, considering the confidentiality provision, and can probably be attributed to the need to respond to the enormous political pressure put on the Administration during the DPW controversy.

¹⁷⁰ *Id.*

¹⁷¹ For a list of these terminals and ports, see United States Department of Homeland Security Fact Sheet, *supra* note 13.

¹⁷² Department of the Treasury Press Release Feb. 24, 2006, *supra* note 169.

¹⁷³ *Id.*

¹⁷⁴ Ted Bridis, *Department Initially Opposed Ports Deal*, SFGATE.COM, Feb. 25, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/02/25/national/w164620S06.DTL>.

¹⁷⁵ *Id.* A Homeland Security representative revealed to Congress that these mitigation measures included DPW agreeing to make various security initiatives with which it had been cooperating mandatory, including the Container Security Initiative, and agreeing to provide the U.S. government with unlimited access to all written records about its U.S. operations without a warrant. *Dubai Purchase Hearings*, *supra* note 138 (prepared statement of Deputy Secretary of Homeland Security Michael Jackson).

¹⁷⁶ *U.S. Puts Strings on Arab Deal for Ports*, SEATTLE POST-INTELLIGENCER, Feb. 23, 2006, at A1.

In late February 2006, as the public became aware of the approval of the DPW ports deal, members of Congress from both houses began to express their displeasure with CFIUS for approving the transaction.¹⁷⁷ The strength of the opposition to the deal is illustrated by the fact that the Senate Majority Leader, the Senate Minority Leader, the Speaker of the House, and the House Minority Leader all publicly expressed their strong reservations about DPW's presence in U.S. ports.¹⁷⁸ Legislation was introduced in Congress that would have required the Administration to begin a new forty-five-day CFIUS investigation of the DPW transaction.¹⁷⁹ Before this legislation was approved, however, CFIUS began a forty-five-day investigation at the request of DPW.¹⁸⁰ Congressional hearings were held to discuss the national security implications of the deal and the CFIUS review process itself.¹⁸¹

In response to criticism of CFIUS's approval of the deal, the Administration and President Bush himself argued that national security would not be harmed in any way by the operation of DPW within these U.S. ports.¹⁸² Furthermore, the President and his supporters argued that the UAE

¹⁷⁷ See, e.g., Alec Magnet, *Opposition to Dubai Control of Port Grows Among Members of Congress*, N.Y. SUN, Feb. 16, 2006, at 1 (listing members of both the House and Senate from both parties who were opposed to the deal).

¹⁷⁸ Press Release, Senate Majority Leader Bill Frist, *Frist Calls for Hold on Sea Ports Deal* (Feb. 21, 2006), http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=2269&Month=2&Year=2006; Press Release, Senate Minority Leader Harry Reid, *Reid: Senate Must Act to Ensure Security of America's Ports* (Feb. 21, 2006), <http://reid.senate.gov/newsroom/record.cfm?id=251796&&year=2006&>; Press Release, Speaker of the House Dennis Hastert, *Speaker Hastert Sends Letter to President Bush Regarding Moratorium and Review of Seaports Deal* (Feb. 21, 2006), <http://speaker.house.gov/library/intrelations/060221Seaport.shtml>; Press Release, House Minority Leader Nancy Pelosi, *Pelosi: Congress Must Conduct Thorough Review of Port Security Deal* (Feb. 21, 2006), <http://www.house.gov/pelosi/press/releases/Feb06/PortSecurity.html>.

¹⁷⁹ 152 CONG. REC. S1489, 1506 (daily ed. Feb. 27, 2006).

¹⁸⁰ Press Release, U.S. Dep't of the Treasury, *CFIUS Welcomes Dubai Ports World's Announcement to Submit to New Review* (Feb. 26, 2006), <http://www.treas.gov/press/releases/js4072.htm> [hereinafter Department of the Treasury Press Release Feb. 26, 2006].

¹⁸¹ See, e.g., *Dubai Purchase Hearings*, *supra* note 138.

¹⁸² President Bush stated, "If there was any chance that this transaction would jeopardize the security of the United States, it would not go forward." Press Release, The White House, *Fact Sheet: The CFIUS Process and the DP World Transaction* (Feb. 22, 2006), <http://www.whitehouse.gov/news/releases/2006/02/print/20060222-11.html> [hereinafter White House Fact Sheet]. The White House argued that the Coast Guard and United States Customs and Border Protection provide security at ports, not terminal operators, and thus the change in management from P&O to DPW would not affect security, that appropriate mitigation/security agreements had been put into place to

could be trusted in this situation because it had provided significant assistance to and cooperation with the United States in the War on Terror and had been one of the first countries to agree to participate in the Container Security Initiative that allowed DHS inspections of cargo bound for the United States at point-of-origin foreign seaports.¹⁸³ Critics of CFIUS's decision rejected these arguments, pointing out that the UAE was the home of some of the September 11 hijackers and the source of some of their funding.¹⁸⁴ They argued that a UAE-owned company could thus not be trusted with port security.¹⁸⁵

Ultimately, the arguments of the opponents of the deal won out in Congress; the House Appropriations Committee voted 62–2 on March 8, 2006 to block the transfer of the port terminals to DPW.¹⁸⁶ That same day Senator John Warner read a press release on the Senate floor in which DPW announced its intention to “transfer” the U.S. terminal operation rights it would acquire with its purchase of P&O “to a still-unnamed American company.”¹⁸⁷ As of May 2006, DPW had yet to sell its U.S. ports assets to an American company, though around thirty companies had expressed interest in a deal.¹⁸⁸ Thus, DPW has actually been operating the terminals that were

address security concerns, and that language about DPW “owning” or “operating” U.S. ports was overplayed and misleading. *See, e.g., id.* DHS also pointed out that media reports that DPW would “operate” or “control” the ports in question were overblown; in fact, DPW would only acquire the right to operate and manage a limited number of terminals within each port: two of fourteen terminals in Baltimore, one of five terminals in Philadelphia, one of three terminals in Miami, two of five terminals in New Orleans, four of twelve terminals in Houston, and one of four terminals in Newark/Elizabeth. Department of Homeland Security Fact Sheet, *supra* note 13.

¹⁸³ *See, e.g.,* White House Fact Sheet, *supra* note 182.

¹⁸⁴ *See, e.g.,* Editorial, *Port Insecurity*, N.Y. POST, Feb. 14, 2006, at 26; Frank Gaffney, Jr., Editorial, *Port of Entry*, WASH. TIMES, Feb. 14, 2006, at A17 (editorial by a conservative national security expert opposing the DPW transaction); Alec Magnet, *Schumer Calls for Probe of Arab Port Deal*, N.Y. SUN, Feb. 14, 2006, at 2 (discussing opposition of liberal Sen. Chuck Schumer (D-NY), to the DPW transaction); 152 CONG. REC. S1489, 1508–09 (daily ed. Feb. 27, 2006) (floor statement of Sen. Susan Collins, R-ME, opposing the DPW transaction).

¹⁸⁵ *See, e.g.,* Gaffney, *supra* note 184, at A17 (comparing the DPW deal to contracting out airport security to the UAE); *see also* Press Release, Senator Harry Reid, The Senate Must Act to Consider Port Security (Feb. 23, 2006), <http://reid.senate.gov/newsroom/record.cfm?id=251860&&year=2006&>.

¹⁸⁶ Sanger, *supra* note 15, at A1.

¹⁸⁷ *Id.*

¹⁸⁸ Peter T. Leach & Rick Eyerdam, *Time to Spare*, FLORIDA SHIPPER, May 22, 2006, at 12.

at issue during the ports controversy since it agreed to sell its rights to those terminals in March, and has done so without incident.¹⁸⁹

While DPW's decision to relinquish its rights to these U.S. port terminals ended the controversy surrounding this specific transaction, it marked a renewed attention and debate concerning CFIUS issues, which had lessened somewhat since the termination of the CNOOC transaction. In response to DPW, numerous members of Congress began to discuss the possibility of making major changes to the Exon-Florio statute and proceeded to introduce legislation to that effect.¹⁹⁰

IV. RECENT PROPOSED CHANGES TO EXON-FLORIO

The strong congressional reactions to CNOOC's attempt to acquire Unocal and DPW's ultimately successful attempt to acquire P&O not only put political pressure on CNOOC to withdraw its bid and on the Bush Administration to block the DPW transaction, but also led to efforts in Congress to make changes to the Exon-Florio statute.¹⁹¹ This movement to amend the statute was also fueled by the release of a September 2005 report by the Government Accountability Office ("GAO"), which was highly critical of the Department of the Treasury's chairmanship of CFIUS and its implementation of Exon-Florio.¹⁹²

A. GAO Recommendations

In a September 2005 report issued by the GAO, the investigative agency found the implementation of the Exon-Florio statute by CFIUS to be lacking in a number of areas and made recommendations for changes to the statute and the CFIUS process.¹⁹³ For example, the GAO report criticized the manner in which Treasury interprets national security under Exon-Florio, arguing that the Treasury interpretation is too narrow, and called for Congress to specify clear factors that must be considered when determining

¹⁸⁹ *Id.*

¹⁹⁰ See *infra* text accompanying notes 197–200.

¹⁹¹ See Corr, *supra* note 11, at 38; Carl Hulse & Heather Timmons, *Lawmakers Plan for New Security Reviews*, N.Y. TIMES, Mar. 3, 2006, at A16 (stating that lawmakers viewed the DPW situation as “proof that the existing system [CFIUS] had broken down,” and including an acknowledgement by Deputy Secretary of the Treasury Robert M. Kimmitt that changes to Exon-Florio were likely).

¹⁹² U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS 3-5 (2005).

¹⁹³ *Id.* at 21–24.

if an acquisition poses a national security threat.¹⁹⁴ GAO also called for Congress to extend the time allowed for the review process by statute, argued against and recommended an end to the practice of companies withdrawing and re-filing their notices at the request of CFIUS in order to buy time for the review, and sought more transparency regarding CFIUS's deliberations and called for more reporting to Congress by CFIUS on its actions.¹⁹⁵

B. Congressional Proposals to Amend Exon-Florio

In the midst of the furor in Congress over the CNOOC and DPW controversies, numerous members of Congress began to consider the need to make changes to Exon-Florio in order to improve the statute's effectiveness.¹⁹⁶ Hearings were held that addressed the CNOOC acquisition attempt and the concerns raised by the GAO's 2005 report on CFIUS. Several members of Congress submitted various proposals to change the Exon-Florio statute.

For example, Senator Richard Shelby, the chairman of the Senate Banking, Housing, and Urban Affairs Committee, introduced an amendment to a defense bill in August 2005 that would have made significant changes to Exon-Florio.¹⁹⁷ Shelby's proposal would have: (1) added economic security to national security as the focus of CFIUS reviews, (2) given committees in the Senate and House the ability to order CFIUS to undertake an investigation of state-owned foreign entities even if CFIUS did not seek a

¹⁹⁴ *Id.* at 11–13.

¹⁹⁵ *Id.* at 2–21. During 2005 congressional hearings, the GAO presented its findings regarding Treasury's implementation of Exon-Florio. *Foreign Investments in the United States: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs*, 109th Cong. (2005) available at LEXIS CQ Congressional Testimony Database [hereinafter *Foreign Investments Hearings*] (testimony of Katherine Schinasi, Managing Director, Acquisition and Sourcing Management, Government Accountability Office, and Ann Calvaresi-Barr, Director, Industrial Base Issues, Government Accountability Office). GAO representatives argued that the "many disputes" between CFIUS member agencies regarding various transactions were evidence of the broken nature of the CFIUS process. The GAO representatives also repeatedly emphasized the report's finding that Treasury used a definition of national security that was not strict enough to protect against real threats and that it forced this definition on other member agencies. They were also concerned that based on the cases they had reviewed it appeared that Treasury did not always consider the factors that were provided by the Exon-Florio statute. However, the representatives also expressed agreement with Treasury that the term "national security" should remain undefined, because the lack of a definition provided needed flexibility.

¹⁹⁶ See Corr *supra* note 11, at 38; Hulse & Timmons *supra* note 191, at A16.

¹⁹⁷ Orol, *Spooked by CNOOC*, *supra* note 158, at 94; Ron Orol, *Defense Bill Clears Sans CFIUS Move*, DAILY DEAL, Nov. 16, 2005 [hereinafter Orol, *Defense Bill*].

forty-five-day investigation on its own, and (3) required additional reporting by CFIUS to Congress, among other things.¹⁹⁸

Senator James Inhofe also submitted a proposal to amend Exon-Florio. Known as the "Foreign Investment Act of 2005," Inhofe's proposal would have made a number of sweeping changes to the statute.¹⁹⁹ For example, this proposal would have (1) changed the period for CFIUS reviews from thirty to sixty days, (2) required that the findings of a review be reported not simply to the President, but also to the relevant committee of jurisdiction in the House and Senate, (3) made mandatory those factors relating to analysis of national security concerns that previously had been considered discretionary, and added a final factor relating to this analysis that included both economic security and energy needs, (4) enhanced reporting requirements to the Congress, (5) required that CFIUS complete reviews even when notice is withdrawn by a party, and (6) perhaps most significantly, provided that after a presidential determination to allow a transaction, Congress within ten days could block the transaction by passage of a joint resolution.²⁰⁰

Ultimately, both the Shelby and Inhofe proposals to amend Exon-Florio were excluded from the 2005 defense bill.²⁰¹ However, both Shelby and Inhofe indicated at that time that they intended to re-introduce amendments to the Exon-Florio statute in the future.²⁰² A "Sense of the Congress" resolution was attached to the National Defense Authorization Act for Fiscal Year 2006 that stated that the President should establish a strategic plan to deal with the rise of China in economic, military, and diplomatic arenas.²⁰³ This plan was required to demonstrate:

[a]ctions to review laws and regulations governing the Committee on Foreign Investment in the United States (CFIUS), including exploring whether the definition of national security should include the potential

¹⁹⁸ See Orol, *Spooked by CNOOC*, *supra* note 158 at 94.

¹⁹⁹ Foreign Investment Security Act of 2005, S. 1797, 109th Cong. (2005).

²⁰⁰ *Id.* § 2. These changes reflect in part the GAO's concerns about the process of withdrawing a notice and re-filing, the limited time available for CFIUS member agencies to review a transaction, and requiring more transparency in the CFIUS process by increasing the reporting requirements to Congress. See *supra* note 191.

²⁰¹ Orol, *Defense Bill*, *supra* note 197.

²⁰² Orol, *Defense Bill*, *supra* note 197; *US Sen Shelby Text: Resuming GSE, Credit Agency Reform Push*, MARKET NEWS INT'L, Jan. 31, 2006; see also Stephanie Kirchgaessner & Edward Alden, *US Plans Reform of Scrutiny Panel to Reassure Investors*, FIN. TIMES (London), Jan. 27, 2006, at 11 (stating that the Bush Administration was attempting to "head off pressure from Congress for new legislation, which would be likely to push the administration to use CFIUS more aggressively to protect [U.S.] 'economic security.'").

²⁰³ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1234(b)(1), 119 Stat. 3136, 3471 (2006).

impact on national economic security as a criterion to be reviewed, and whether the chairmanship of CFIUS should be transferred from the Secretary of the Treasury to a more appropriate executive branch agency.²⁰⁴

Soon after this, numerous other bills were submitted in Congress dealing with potential changes to Exon-Florio.²⁰⁵ These numerous proposals, however, were generally pushed to the side as Senator Shelby's bill—modified from its previous version—was approved by the Senate Banking, Housing, and Urban Affairs Committee on a 20–0 vote, and a bill primarily championed by House Majority Whip Roy Blunt was approved by the House Financial Services Committee in a vote of 64–0.²⁰⁶ The Shelby bill, seen as less favorable to business, would: designate the Secretary of Defense as the Vice Chairman of CFIUS; allow CFIUS member agencies to unilaterally extend a review from thirty to sixty days; require detailed reporting by CFIUS to various members of Congress at multiple stages of the review process; require that CFIUS notify the governors of states relevant to a transaction of the proposed transaction; add the Director of National Intelligence to CFIUS's membership; enshrine CFIUS in statute (rather than executive order); and require investigations of transactions involving critical infrastructure and energy assets, and more.²⁰⁷ In July 2006, however, Senator

²⁰⁴ § 1234(c)(8), 119 Stat. at 3472.

²⁰⁵ Between March 7 and March 9, 2006, alone, the following bills were introduced in Congress, each of which modified or affected Exon-Florio in different ways: National Defense Critical Infrastructure Protection Act of 2006, H.R. 4881, 109th Cong. § 3 (2006) (requiring additional factors to be considered in CFIUS reviews, addition of annual reports, modifications to notice system, etc.); H.R. 4885, 109th Cong. (2006) (prohibiting CFIUS from approving any merger or acquisition involving a company owned by a foreign state that does not recognize United Nations member states, presumably implying Israel); Committee on Foreign Investment in the United States Reform Act, H.R. 4915, 109th Cong. § 6 (2006) (implementing Executive Order 11,858 as amended in statutory form and making numerous changes); Protect America First Act of 2006, H.R. 4917, 109th Cong. § 2 (2006) (requiring CFIUS to notify Congress upon receipt of a voluntary notice, etc.); Foreign Investment National Security Review Act of 2006, H.R. 4929, 109th Cong. (2006) (making numerous substantive changes to Exon-Florio's provisions as well as implementing CFIUS by statute); U.S. National Security Protection Act of 2006, S. 2380, 109th Cong. (2006) (making numerous substantial changes to Exon-Florio, including adding the Director of National Intelligence and the Director of Central Intelligence to CFIUS, and making the Secretaries of Defense and Homeland Security the vice-chairs of the Committee). The frequency with which bills were being introduced earlier this year to amend CFIUS demonstrates the relevance of this Note's analysis to statutory changes which are likely to occur and which may have a significant impact on national and economic policy.

²⁰⁶ Richard E. Cohen, *Steaming Toward Dry Dock?*, NAT'L J., July 8, 2006, at 40.

²⁰⁷ See, e.g., Foreign Investment and National Security Act of 2006, S. 3549, 109th Cong. (2006); see also Stephanie Kirchgaessner, *Senate Panel Backs Tougher Takeover*

John Warner (R-VA) blocked an attempt by Senator Shelby to have his bill approved by the full Senate on a "fast track" basis without debate.²⁰⁸

The bill proposed by Representative Blunt in the House was generally viewed more favorably by groups concerned about the possibility that "reforms" to Exon-Florio would go too far and undermine the country's open investment policy.²⁰⁹ Blunt's bill eliminates the loophole that developed in regard to the Byrd Amendment by requiring investigations of transactions in which the acquiring company is controlled by a foreign government; it also makes the Secretary of Homeland Security the vice chairman of CFIUS, requires that CFIUS provide a report to various members of Congress on the completion of an investigation (rather than on every individual covered transaction), requires semi-annual reports to Congress, addresses the enforcement of mitigation agreements, requires investigations of transactions involving critical infrastructure, clarifies that national security includes "homeland security" and "critical infrastructure," and more.²¹⁰

Though the Bush Administration had not taken an official position on these bills as of early July 2006, one of its representatives speaking before a congressional committee seemed to indicate that some of the changes included therein might be acceptable to the Administration.²¹¹ As of the time

Review, FIN. TIMES (London), Mar. 31, 2006, at 9; Ron Orol, *CFIUS Gets Overhaul*, DAILY DEAL, Apr. 3, 2006; Amy Fagan, *Port Security Measures Advance in Congress; CFIUS Revamping, More Funds Proposed*, WASH. TIMES, Mar. 31, 2006, at A4. Originally, the version of the Shelby bill that the Banking Committee approved also included a provision that would have required the government to "rank" countries based on their "relationships with the United States and their potential for diversions of military-sensitive technologies." Cohen, *supra* note 206, at 41. This provision was very unpopular with businesses, and Senator Shelby ultimately removed it from the bill after the committee vote. *Id.* It should also be noted that "Pentagon officials informed staffers to . . . [Senator] Shelby that they oppose" the provision that would make the Defense Secretary the vice chairman of CFIUS. *Id.* at 40-41.

²⁰⁸ *Id.*

²⁰⁹ See Orol, *supra* note 17.

²¹⁰ Reform of National Security Reviews of Foreign Direct Investments Act, H.R. 5337, 109th Cong. (2006); see also H.R. REP. NO. 109-523, at 9-10 (2006); Stephanie Kirchgaessner, *Bill Seeks to Tighten Security Review of Foreign Investors*, FIN. TIMES (London), Apr. 28, 2006, at 8; Cohen, *supra* note 206, at 40-41.

²¹¹ Assistant Secretary of the Treasury for International Affairs Clay Lowery told the Committee:

Reforms should address two broad principles: U.S. national security imperatives in the post-9/11 environment and the need to continue welcoming investment in the U.S. and creating good jobs for American workers.

To advance those principles, the Administration supports improving communications with Congress on CFIUS matters. The Administration also welcomes other reforms to the CFIUS process, including those that enhance

this Note goes to publication, it is uncertain which—if any—of these bills will ultimately be enacted. Therefore, it is important to analyze these proposed amendments in light of the need to balance the promotion of an open foreign investment policy with the robust national security strategy that is crucial to protecting the United States in the post-September 11 world.

V. PRESERVING THE NATIONAL SECURITY-OPEN INVESTMENT BALANCE

National security is and should be the primary concern of the United States government, and therefore CFIUS certainly serves an important national interest.²¹² Threats to our country's national security come in a variety of forms, whether from state actors like Iran or terrorist groups like al-Qaeda.²¹³ In the aftermath of the attacks on the United States on September 11, 2001 by al-Qaeda, and in the midst of the War on Terror, the

accountability, preserve the attractiveness of the United States for foreign investment, focus resources on transactions that present national security issues, ensure due consideration of the nature of the acquirer and assets to be acquired, strengthen the role of the intelligence community, and improve CFIUS monitoring of mitigation agreements. The CFIUS process should first and foremost ensure U.S. national security but should not unnecessarily discourage legitimate investment in U.S. businesses that will provide income, innovation, and employment for Americans.

Foreign Investments in U.S.: Hearing Before the Subcomm. on Domestic and Int'l Monetary Pol'y, Trade, and Tech. of the H. Fin. Services Comm., 109th Cong. (2006), available at LEXIS CQ Congressional Testimony Database (statement of Clay Lowery, Assist. Secretary of the Treasury for International Affairs).

²¹² This view is held not only by the author, but by the Bush Administration as well. Robert Kimmitt, Comment, *America Seeks to Balance Investment and Security*, FIN. TIMES, Jan. 27, 2006 ("Promotion of an open investment policy at home does not mean national security concerns are secondary to economic considerations. A government official has no higher priority than protecting national security.").

²¹³ See, e.g., Christopher R. Fenton, Note, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 198–99 (2002). Fenton's Note argues, correctly, that the threat to the United States from decentralized terrorist groups probably necessitates a shift in CFIUS's approach to transactions which may affect national security. *Id.* at 200. Given that other governments may have export control laws which are more lax than our own (or even simply do not have the same level of concern about terrorism that the U.S. has), CFIUS should consider the possibility that a merger or acquisition could result in an improper transfer of U.S. technology at a later point in time. *Id.* at 232–33. CFIUS also should consider homeland security needs, such as the protection of telecommunications systems, in making national security decisions. *Id.* at 235. The Bush Administration has taken this goal seriously, as evidenced by its investigation of Nippon Telegraph and Telephone's attempt to acquire Verio. *Id.* Finally, CFIUS should examine transactions to determine the probability that the merger would make it easier for terrorist groups to gain access to sensitive information. *Id.* at 237–42.

Bush Administration has significantly enhanced the level of scrutiny provided by CFIUS over transactions which might affect national security and adjusted its CFIUS review process to reflect a post-September 11 conception of security needs.²¹⁴ Additionally, recent CFIUS cases demonstrate that the Bush Administration has expanded the concept of national security beyond the traditional Exon-Florio focus on traditional military activity.²¹⁵

²¹⁴ Harry L. Clark & Sanchitha Jayaram, *Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions*, 38 CORNELL INT'L L.J. 391, 395 (2005) ("The Exon-Florio Amendment has received considerably more attention in recent years, particularly since the terrorist attacks of September 2001 . . ."); *Implementation of the Exon-Florio Amendment and the Committee on Foreign Investment in the United States: Hearing Before the S. Banking, Housing and Urban Affairs Comm.*, 109th Cong. (2005), available at LEXIS Federal News Service Database [hereinafter *Implementation Hearings*] (David Marchick, Partner at Covington and Burling and CFIUS expert, testified before the Senate Committee that the Bush Administration had applied "greater scrutiny" to CFIUS transactions since the attacks of September 11, 2001 by "impos[ing] tougher [security] requirements as a condition for approval, . . . and enhanc[ing] enforcement of security agreements negotiated through the Exon-Florio process."); David Marchick, Mark Plotkin & David Fagan, *National Security Regulation of Foreign Investments and Acquisitions in the United States*, CHINA L. & PRAC., June 2005, at 23, 24–25.

²¹⁵ Clark & Jayaram, *supra* note 214, at 395 ("In a series of Exon-Florio cases, the Bush Administration has made it clear that it intends to scrutinize inbound investment more closely and that it has adopted a broader view of the types of transactions that could threaten national security."). Clark and Jayaram go on to discuss a number of recent transactions which received greater scrutiny by CFIUS than would have been expected before September 11. For example, the attempted acquisition of Global Crossing by China's Hutchison Whampoa ultimately failed due to strong CFIUS resistance. *Id.* at 395–96. The Department of Defense raised serious concerns about the acquisition of the Silicon Valley Group by ASML, a Dutch company, and the matter was sent to the President for a decision. *Id.* at 395. Finally, CFIUS intensely scrutinized the acquisition of IBM by Lenovo, a Chinese company, approving it only after concluding a mitigation agreement. *Id.* at 396. The Bush Administration has also increased the use of network security agreements, a form of mitigation agreement with telecommunications companies that allows the Department of Justice to gain access to their facilities in order to carry out wiretaps and electronic surveillance. *Id.* at 396. Clark and Jayaram's argument seems to receive further support from the fact that it was the likelihood of a negative report by CFIUS after a forty-five-day investigation, and subsequent likely negative determination by the President that led an Israeli company to give up its bid to acquire a U.S. internet security company. See, e.g., Jamie Smith Hopkins, Siobhan Gorman & Tricia Bishop, *Security Fears Scuttle Deals; Sourcefire Episode Reflects Shift Against Foreign-Owner Roles*, BALTIMORE SUN, Mar. 25, 2006, at 12C. The Department of Defense and FBI had raised serious concerns about foreign ownership of a company that provides internet security technology to their respective national security related agencies. Dagoni, *supra* note 143.

The Bush Administration's efforts to take a vigilant approach towards mergers and acquisitions that could potentially negatively impact U.S. national security under Exon-Florio is appropriate, and in line with the Administration's broader national security policy goals. However, the need to focus on threats to national security that could emerge in the context of foreign mergers and acquisitions must be balanced against another important consideration: the need to maintain an open investment policy.²¹⁶ This policy not only benefits the U.S. economy in a direct sense, but also benefits the United States and world economies indirectly by serving as an example of the need for other states to reciprocate with open investment policies.²¹⁷ Therefore, it is important that any changes to the Exon-Florio statute not inappropriately upset the current balance between national security and an open investment policy.

A. Analysis of the Current National Security/Open Investment Balance

As presently constituted, the Exon-Florio system strikes a proper balance between national security and open foreign investment.²¹⁸ This balance is possible due to the lack of a definition of national security, the freedom to negotiate mitigation agreements with foreign firms, the stability inherent in a system which is relatively free of politicization from outside forces, and the dynamic interaction and exchange of ideas between the CFIUS member agencies that ensures all concerns are addressed. In fact, even the GAO, which offered an extensive criticism of the Treasury Department's leadership

²¹⁶ The need for maintaining such a balance in the Exon-Florio context has been recognized by the Bush Administration. See Kimmitt, *supra* note 212, at 11 ("The interests of both the US and foreign countries and investors are served by striking the right balance between open investment and national security."). This necessity was also recognized by the Administration of President George H. W. Bush. *Foreign Direct Investment Hearings*, *supra* note 100, at 3 (statement of William E. Barreda, Deputy Assistant Secretary for Trade and Investment Policy, Department of the Treasury) ("[W]e believe the Exon-Florio statute is achieving its goal in striking a very delicate balance, the balance that protects the national security without discouraging foreign direct investment.").

²¹⁷ Editorial, *Ports of Gall*, WALL ST. J., Feb. 25, 2006, at A10; Posting of Dale Oesterle to Business Law Prof Blog, http://lawprofessors.typepad.com/business_law/2006/02/my_editorial_on.html#more (Feb. 27, 2006) [hereinafter Oesterle, Business Law Prof Blog] ("Economists caution that international investment goes both ways. For our companies to enjoy the opportunity to invest abroad, we must allow foreign companies to invest here. Blocking local investments is a prelude to a trade war in which all the participants lose economic vitality.").

²¹⁸ *Dubai Purchase Hearings*, *supra* note 138 (statement of Todd M. Malan, President and CEO, Organization for International Investment).

of CFIUS in its 2005 report, expressed agreement with the first two of these points (at a minimum) during testimony before the Senate Banking Committee.²¹⁹ While the Exon-Florio statute itself does not necessarily detail the importance of these four factors, and though they were not necessarily foreseen by the drafters of the statute, they do reflect the compromises that were struck in 1988 when the statute was first passed.²²⁰ Over time, these factors have demonstrated to be the strength of the Exon-Florio system.

The lack of a firm definition of national security in the Exon-Florio context ensures that CFIUS can respond to novel or emerging threats to national security while preventing the Committee from expanding its influence into areas which are not properly the subject of CFIUS review.²²¹ CFIUS cases which have received press attention demonstrate the benefit of the lack of a definition of national security. For example, in 2004, CFIUS reviewed the proposed acquisition of Global Crossing, an American provider of fiber-optic networks, by Hutchison Whampoa Ltd. of Hong Kong, China.²²² After a forty-five-day investigation was initiated, Hutchison Whampoa ultimately dropped out of the transaction. The Department of Defense raised national security concerns related to the ownership of the company by the Chinese government in part because of the possibility of that government gaining access to U.S. communications.²²³ The technology maintained by Global Crossing clearly does not fit within the traditional conception of national security inputs; it is not technology directly used by the military, such as a tank or missile. However, it is technology which is essential to the operation of a high-tech military in the twenty-first century,

²¹⁹ *Foreign Investment Hearings*, *supra* note 195 (testimony of Katherine Schinasi, Managing Director, Acquisition and Sourcing Management, Government Accountability Office, and Ann Calvaresi-Barr, Director, Industrial Base Issues, Government Accountability Office).

²²⁰ For a discussion of the compromise that was struck by the Reagan Administration and the original drafters of the Exon-Florio statute, see *supra* text accompanying notes 71–85.

²²¹ The Treasury Department seems to agree with this assessment today. Stephanie Kirchgaessner, *Treasury Official Defends Foreign Takeover Vetting*, FIN. TIMES (London), Oct. 21, 2005, at 10 (quoting Deputy Secretary Robert Kimmitt) (“The day you try to define [national security] it will be out of date.”). This position, however, has its critics. Some in the business world argue that the lack of a definition creates uncertainty, and criticize the fact that the approach to national security depends on the particular views of the presidential administration in place at any particular time. See, e.g., Fenton, *supra* note 213, at 213 n.96; Oesterle, Business Law Prof. Blog, *supra* note 217.

²²² Jonathan Peterson, *Panel Has a Big Say in Foreign Purchases; Security Clearance for a Chinese Bid for Unocal Would Hinge on Obscure U.S. Committee*, L.A. TIMES, July 5, 2005, at C4.

²²³ *Id.*

thus leading to the concerns of the Defense Department about the secrecy of government communications.²²⁴ Similarly, in 2005, some argued that the safety of the nation's oil supply was a matter of national security that should justify CFIUS's heightened scrutiny of CNOOC's attempt to acquire Unocal.²²⁵ Concerns about oil, like concerns about telecommunications, also do not fit within the traditional concept of military inputs; and the lack of a definition of national security allowed this non-traditional but still security-related concern to be addressed.

Thus, while debate exists on this point, there are strong arguments to be made for the inclusion of the telecommunications and oil industries within the national security rubric. By leaving "national security" undefined both in the Exon-Florio statute itself and in the Treasury-issued CFIUS regulations, the Committee is able to adapt the concept of national security to situations which may not be directly covered by a list of factors provided by Congress in the 1988 statute. The Bush Administration takes this concept a step further, and seems to argue that economic security is in fact already a component of national security.²²⁶ Therefore, even if one did not accept the

²²⁴ See *id.* It should also be noted here that after Hutchison Whampoa withdrew its bid to acquire Global Crossing, Singapore Technologies Telemedia received approval from President Bush to acquire the U.S. company. *Dubai Purchase Hearings*, *supra* note 138 (testimony of Robert Kimmitt, Deputy Secretary of the Department of Treasury). This approval came after a full forty-five-day investigation by CFIUS. *Id.* A report on the President's approval of the transaction was sent to Congress, the most recent such report to be completed. *Id.*

²²⁵ See *supra* text accompanying notes 161-63; Steve Lohr, *Unocal Bid Denounced at Hearing*, N.Y. TIMES, July 14, 2005, at C1. Arguments linking oil to national security were made at a Congressional hearing by former CIA Director R. James Woolsey and other witnesses. *Id.* Their argument was that China's growing economy and military were driving it to build up oil assets, and thus allowing CNOOC to purchase Unocal would fuel the country's military growth and disadvantage the United States. *Id.* Others, including the libertarian Cato Institute, argued that the actual threat from CNOOC's acquisition of Unocal was non-existent, due to the nature of oil as a fungible global commodity. *Id.*

²²⁶ NATIONAL SECURITY STRATEGY, *supra* note 1, at 17 ("A strong world economy enhances our national security by advancing prosperity and freedom in the rest of the world."); *Implementation Hearings*, *supra* note 214 (statement of Deputy Secretary of the Treasury Robert M. Kimmitt) ("[T]he concept of national security includes both traditional foreign policy and defense criteria and also economic considerations. Indeed, we believe there is an inherent link between our national security interests and a strong U.S. economy that facilitates free and fair trade . . . and the free flow of capital across borders."). It should be noted that considering economic security one component among many of national security is a far cry from making economic security a goal of CFIUS review, as has been proposed by some and is discussed below. See *infra* text accompanying notes 290-302. This more limited approach to including economic

argument that CNOOC's acquisition of Unocal's oil reserves would have posed a threat to national security as traditionally understood, the acquisition could certainly have been viewed as a threat to the economic element of national security, and thus addressed by Exon-Florio.

The risk of this lack of a definition of national security, of course, is that this gap could be exploited by a future protectionist-minded presidential administration to block transactions which properly should not be deemed to be national security threats.²²⁷ For example, a view of national security which includes a protectionist-minded approach to economic security might lead to CFIUS involvement in efforts to protect the ailing American automobile industry, a result clearly not intended by the Exon-Florio statute. Regardless of whether this approach would even be feasible (pressure to avoid this protectionist approach would surely come from parts of the business community and free-traders in Congress), this risk has not played itself out in fact to date, and does not seem to justify giving up the benefits of leaving national security undefined.

Second, the current Exon-Florio system is very conducive to the negotiation of mitigation agreements. These agreements, negotiated by concerned CFIUS member agencies with the acquiring foreign company, are meant to permit CFIUS to address national security concerns while neither creating a perception of unfriendliness to foreign investment nor actually limiting foreign investment in any significant manner.²²⁸ Such agreements may allow for future monitoring of the company's activities by government officials, require the appointment of special security officers, require government access to the company's business records, etc.²²⁹ With the threat of a forty-five-day investigation, which carries a negative connotation, or even of a negative recommendation to the President and subsequent presidential determination to prevent or undo a transaction, foreign

security as one factor among many in a national security analysis seems more appropriate than adding it as a new and separate criteria for review.

²²⁷ The *Wall Street Journal* criticized certain opponents of the Dubai Ports World deal, including New York Senator Hillary Clinton, for using national security as an excuse to promote protectionist goals. *Ports of Gall*, *supra* note 217, at A10 ("The new protectionists use national security as their cover.").

²²⁸ Fenton, *supra* note 213, at 213.

²²⁹ See, e.g., Biridis, *supra* note 174; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 18–20. The GAO found that the Department of Homeland Security has become the lead CFIUS member agency on the enforcement of these mitigation agreements, and has developed formal procedures for monitoring compliance. *Id.* The Department of Defense's representative at the 2005 hearings regarding CFIUS was one of several agency representatives to state that the negotiation of mitigation agreements was an important tool in the CFIUS process. *Implementation Hearings*, *supra* note 214 (prepared statement of Peter Flory, Assistant Secretary for International Security Policy, United States Department of Defense).

companies involved in CFIUS transactions have a strong incentive to reach agreements which will mitigate national security concerns in the eyes of CFIUS member agencies.²³⁰

Whether these mitigation agreements are reached with the Committee as a whole or with an individual member of the Committee, they have the effect of permitting the foreign investment to go ahead while addressing national security concerns. In fact, the ability for individual CFIUS member agencies to work out their own mitigation agreements with foreign companies is a strength of the system; because CFIUS prefers to make decisions by consensus, members of the Committee that express concerns with a given transaction can prevent approval by withholding their vote until a satisfactory mitigation agreement is reached.²³¹ Therefore, CFIUS exploits this incentive to reach pinpoint agreements, an arrangement which protects national security without having to use the blunt force of a negative presidential decision. Were negative presidential decisions necessary in every case in which minor national security concerns arose, CFIUS would indeed be a serious problem for the country's open investment policy.²³² As currently constituted, however, the use of mitigation agreements contributes to the balance that is currently maintained under Exon-Florio between national security and the needs of an open investment policy.

Third, CFIUS at present operates in an environment that is usually isolated from political concerns, thus preserving the balance between national security and an open investment policy.²³³ This is not to say that CFIUS is not a politicized group—certainly a group of six cabinet secretaries and six high-level White House aides is as political as a group can be. However, the fact that CFIUS usually operates in relative obscurity and is

²³⁰ A 2002 analysis of the Exon-Florio process found that CFIUS only initiated forty-five-day investigations during the period that GAO reviewed when it was unable to negotiate a mitigation agreement with the acquiring company during the thirty-day review. U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE TRADE: MITIGATING NATIONAL SECURITY CONCERNS UNDER EXON-FLORIO COULD BE IMPROVED 6 (2002).

²³¹ Reports indicate that the Department of Homeland Security did just this in regard to the Dubai Ports World acquisition of P&O. See Biridis, *supra* note 174.

²³² The GAO, however, has criticized CFIUS's member agencies for being too lax in their implementation of these mitigation agreements. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 2–3. Specifically, GAO found in 2002 that mitigation agreements often contained “nonspecific language that may make them difficult to implement.” *Id.* at 2. Additionally, GAO found that often these agreements did not have sufficient oversight from CFIUS member agencies or conditions on compliance. *Id.* at 3.

²³³ See *Dubai Purchase Hearings*, *supra* note 138 (statement of Todd M. Malan, President and CEO of the Organization for International Investment) (discussing administrative decision-making on a case-by-case basis free of congressional involvement).

normally free from congressional interference²³⁴ ensures that the process cannot be easily co-opted by members of Congress whose districts might be especially impacted by a certain merger or acquisition.²³⁵

For example, though Senator Evan Bayh of Indiana opposed the acquisition of Indiana-based Magnequench by a Chinese company, the transaction was still completed.²³⁶ The CNOOC and DPW examples discussed at length in this Note demonstrate, however, that Congress can and does involve itself in the CFIUS process when especially significant transactions occur and widespread opposition exists. While congressional oversight on certain transactions may be beneficial, it is appropriate that this involvement is the exception rather than the rule. A lack of politicization in the process of approving CFIUS transactions should foster stability and predictability—goals of the business community—while only involving politics in those transactions which have great potential to harm national security.²³⁷ The absence of pervasive congressional involvement in the review process encourages CFIUS to make objective decisions about

²³⁴ The statute specifically does not include Congress in the Exon-Florio process until *after* the President has made a determination on whether to allow a transaction or to block it; Congress is only notified of the details of a specific transaction if the review, investigation, and presidential determination are all completed. 50 U.S.C. app. § 2170(g) (2000).

²³⁵ As was demonstrated by the legislative history discussed earlier in this Note, the compromise reached between Exon-Florio's Democratic sponsors and the Reagan Administration sought to avoid a politicized process. Exon-Florio "was designed by the Reagan Administration to be discreet, and to keep Congress out, precisely to avoid such politicization." Editorial, *The New Protectionists: How to Create a Real Security Crisis*, WALL ST. J., Mar. 10, 2006, at A18.

²³⁶ See Evelyn Iritani, *New Foreign Investment Scrutiny Pushed; The Drive Was Mounted After China's Push for Unocal, but Businesses Fear That it Could Keep Out Much-Needed Capital From Overseas*, L.A. TIMES, Oct. 6, 2005, at 3. The statement above is not meant to pass judgment on the Magnequench deal, but rather to illustrate the fact that congressional pressure usually must be significant to overcome a CFIUS determination that allows a deal to proceed.

²³⁷ *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick, Partner, Covington and Burling). Marchick stated:

[Including Congress in the CFIUS process] would create so much uncertainty about the prospect of Congressional involvement in the review process that a substantial number of foreign investors would simply not make investments in the United States. . . . But Congress should not itself become a regulatory agency. Congress has not, and would not, override Hart-Scott-Rodino decisions made by the Department of Justice or the FTC.

transactions, thus allowing it to protect national security while acting consistently with an open foreign investment policy.²³⁸

Finally, the current membership structure of CFIUS and its preference to operate by consensus ensure that both national security and an open investment policy are protected, while not short-changing either goal. For example, the GAO's 2005 analysis found that the Department of Defense often holds a broader conception of national security than does the Treasury Department.²³⁹ Because of its unique role in the national security arena, the Department of Defense seems to be given a great degree of deference by other members of CFIUS.²⁴⁰ Meanwhile, the Treasury Department, in its role as chair of the Committee, serves as a reminder to the outside world—and

²³⁸ The author would argue that CFIUS's approval of the DPW transaction prior to the involvement of Congress is an example of how a depoliticized decision-making environment allows CFIUS to make objective decisions. Though the DPW deal came under intense criticism from both sides of the aisle, objective analysis of the transaction seems to indicate that any national security concerns were appropriately dealt with by the Bush Administration. If the deal had been completed, DPW would have merely gained operational control at a limited number of terminals within a limited number of ports. Sanger & Lipton, *supra* note 5, at A12. DPW and Dubai have cooperated with the Container Security Initiative, and the UAE has demonstrated that it is a strong ally of the United States in the War on Terror. Concerns that Islamic terrorists could have used the UAE's ultimate ownership of DPW as a means of gaining access to U.S. ports seem born more of fear than fact; the same could be said for Islamic terrorists based in Britain, which is home to P&O, yet that does not mean that P&O should have been excluded from managing these same U.S. port terminals under British ownership. Additionally, neither the author nor most commentators criticizing the deal have access to the classified intelligence that the Administration holds, and so a full accurate analysis is not possible. To believe that this intelligence objectively demonstrated a significant national security threat from the DPW deal, however, would require believing "that President Bush has suddenly gone soft on security," a conclusion that would defy everything we know about this President. *Ports of Gall*, *supra* note 217, at A10.

Thus, CFIUS was probably correct in approving the DPW acquisition of P&O. It was only after partisan politics was introduced to the review by Congress's insertion of itself into the matter that objective analysis of the situation went by the wayside. Numerous members of Congress and commentators talked about the Administration's "decision to sell our ports," an assertion that was simply untrue. See, e.g., Press Release, Senator Harry Reid, Reid: It Takes More Than Tough Talk to Protect the Nation (Feb. 24, 2006), <http://www.democrats.senate.gov/newsroom/record.cfm?id=251908&>. However, the author also believes that not all future administrations will necessarily approach CFIUS decisions responsibly, and thus congressional awareness and oversight of the CFIUS process is important. See *infra* text accompanying notes 274–89.

²³⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 12.

²⁴⁰ Lewis, *supra* note 161, at 465. The Department of Justice (DOJ) has also traditionally wielded significant influence in the CFIUS process. The DOJ and Department of Defense (DOD) together have historically taken the lead role in negotiating mitigation agreements before any final CFIUS vote is taken. *Id.*

presumably to CFIUS members—that open investment is an important goal that should be sustained unless there are serious national security problems with a transaction.²⁴¹ The end result of these disagreements over policy, or at least over the weight of certain facts in various transactions, is a system in which CFIUS members typically act by consensus to ensure that all concerns are met.²⁴² However, if even one member feels that a national security concern exists and consensus cannot be achieved, the Committee moves into a forty-five-day investigation in order to get more information and to address the concerns of all parties.²⁴³ Therefore, the process as currently structured ensures that all views are addressed and that no transaction proceeds over the objection of any member agency.

B. Analysis of Proposed Changes to the Exon-Florio Balance

Given the fact that the current implementation of Exon-Florio strikes the proper balance between forceful protection of national security and a firm commitment to foreign investment, it is important that any proposed changes to the Exon-Florio statute merely enhance this balance, rather than upset it. Suggestions for amending Exon-Florio made within the past year have been many and varied. The bills currently moving through Congress sponsored by Senator Shelby and Representative Blunt seem to have backed away from some of the more radical suggestions to change Exon-Florio that were proposed in recent months. However, it is still useful to examine some of the more significant proposals for change and to evaluate their possible effect on the balance currently maintained by CFIUS between national security and open investment.²⁴⁴ The provisions of recent proposals to amend Exon-Florio deserving the most focused attention are those proposals that (1) give Congress the ability to pass a joint resolution reversing the president's

²⁴¹ *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick, Partner, Covington & Burling).

²⁴² *See Implementation Hearings*, *supra* note 214; *see also* Lewis, *supra* note 161.

²⁴³ *Implementation Hearings*, *supra* note 214.

²⁴⁴ Clearly, legislation proposed in one session of Congress to deal with a particular issue may differ in substantial ways from legislation introduced in another session on the same issue. Therefore, the following analysis is not meant to describe the effect of changes that will necessarily be made to Exon-Florio, but rather to demonstrate why substantial changes to CFIUS have the potential to harm the balance between national security and open investment, a result that would ultimately undermine both goals. Even if the bills sponsored by Shelby and Blunt are eventually reconciled and enacted, some of the more radical proposals for changing CFIUS could re-emerge in the future if another transaction that excited Congress and the public such as the DPW transaction were to emerge. Therefore, the remainder of this Note avoids commenting on specific proposals currently before Congress, and rather focuses on the most significant recent proposals.

decisions under the statute; (2) add economic security as a touchstone for CFIUS review; (3) enhance CFIUS's reporting requirements to Congress; and (4) shift the chairmanship of CFIUS from the Secretary of the Treasury to the Secretary of Defense or Homeland Security.

1. Congressional Review of CFIUS Decisions

In 2005, Senator Inhofe proposed amending the Exon-Florio statute in order to give Congress the ability to review and overrule CFIUS decisions that would permit a merger or acquisition to proceed.²⁴⁵ Specifically, the bill stated that after a decision by the President to permit an acquisition, Congress would have ten days to introduce a joint resolution that would have the effect of blocking the acquisition.²⁴⁶ If a joint resolution was introduced, the acquisition could not commence until thirty days had passed since the introduction of that resolution.²⁴⁷ If the resolution was passed by both houses

²⁴⁵ Inhofe's amendment would have added section (l) to Exon-Florio:

(l) Congressional Authority.

(1) In general. If the President does not suspend or prohibit an acquisition, merger, or takeover under subsection (d), the acquisition, merger, or takeover may not be consummated until 10 legislative days after the President notifies the Congress of the decision not to suspend or prohibit. If a joint resolution objecting to the proposed transaction is introduced in either House of Congress by the chairman of one of the appropriate congressional committees during such 10-legislative-day period, the transaction may not be consummated until 30 legislative days after the date on which such resolution is introduced.

(2) Disapproval upon passage of resolution. If a joint resolution introduced under paragraph (1) is enacted into law, the transaction may not be consummated.

(3) Considerations. The Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives shall review any findings and recommendations submitted under subsection (a) or (b), and any joint resolution under paragraph (1) of this subsection shall be based on the factors outlined in subsection (f).

(4) Senate procedure. Any joint resolution under paragraph (1) shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976 (Public Law 94-329, 90 Stat. 765).

(5) House consideration. For the purpose of expediting the consideration and enactment of a joint resolution under paragraph (1), a motion to proceed to the consideration of any such joint resolution shall be treated as highly privileged in the House of Representatives.

Foreign Investment Security Act of 2005, S. 1797, 109th Cong. § 2(5) (2005).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

and signed by the President, then the transaction would be completely blocked.²⁴⁸ At least in Inhofe's 2005 proposal, it should be mentioned, no reference is made to any congressional power to overrule the President on a decision not to order *divestiture* of an already acquired company though this may have been a mere drafting oversight.²⁴⁹

While the furor over the Dubai ports deal in 2006 stemmed in part from the fact that Congress was not notified by CFIUS of its intent to approve the acquisition of P&O by DPW, and thus changes may indeed be appropriate to Exxon-Florio in the area of CFIUS's obligations to comply with congressional oversight,²⁵⁰ the Inhofe bill's mechanism for inserting Congress in CFIUS's activities is unwise. At least one individual opposed to increased congressional involvement in CFIUS has argued that such a change as that in Senator Inhofe's proposal might be unconstitutional under *INS v. Chadha*.²⁵¹ This charge merits careful analysis, but ultimately fails as a matter of constitutional law.

In *Chadha*, the United States Supreme Court examined section 244(c)(2) of the Immigration and Nationality Act, which gave the Attorney General the ability to permit certain aliens to remain in the country.²⁵² Section 244(c)(2) of this Act permitted one house of Congress to overrule decisions by the Attorney General to permit an individual to remain in the United States rather than face deportation.²⁵³ Chadha, an East Indian who held a British passport and was born in Kenya, was permitted to remain in the United States by the Attorney General, acting through an immigration judge.²⁵⁴ In December 1975, the House of Representatives passed a resolution overruling this decision and requiring Chadha's deportation.²⁵⁵

The Court rested its opinion on two grounds: bicameralism and presentment.²⁵⁶ The Supreme Court held that the Constitution specifically

²⁴⁸ *Id.* This is assuming that the language of the statute should be taken at its face value, and by "joint resolution" the involvement of the President is intended. *See infra* note 263.

²⁴⁹ *Id.* Such a resolution would be necessary, for example, in a situation such as the one in 1990 where the CATIC/MAMCO transaction was consummated before the President could render his final decision. *See supra* notes 140–43.

²⁵⁰ *See infra* text accompanying notes 274–89.

²⁵¹ *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983); *Implementation Hearings*, *supra* note 214 (statement of David Marchick, Partner, Covington and Burling) ("I think it also . . . creates some separation of powers issues and may have problems under the *Chadha* decision.").

²⁵² *See Chadha*, 462 U.S. at 923.

²⁵³ *See id.* at 923.

²⁵⁴ *See id.* at 923–24.

²⁵⁵ *Id.* at 927–28.

²⁵⁶ *Id.* at 945.

requires that all actions of a legislative character be approved by both houses of Congress and then be presented to the President for his signature.²⁵⁷ Because one chamber's effort to overrule the Attorney General's decision to permit Chadha to remain in the country was legislative in character, and made by one house acting alone without the President's involvement, the actions of the House of Representatives in regards to Chadha violated the bicameralism and presentment requirements.²⁵⁸ Furthermore, as one of the dissenters pointed out, the Court wrote its opinion in such a broad manner that it not only invalidated the one-house legislative veto provision specifically before it, but it declared all legislative vetoes of any type to be unconstitutional.²⁵⁹

Therefore, if the congressional role in CFIUS decisions envisioned by the Foreign Investment Security Improvement Act were a legislative veto, it would be unconstitutional. In fact, this proposal is not a legislative veto. Rather, it can be better characterized as a "report-and-wait" provision that is constitutional under *Sibbach v. Wilson*.²⁶⁰ In that case, the Supreme Court held constitutional a statute that prevented newly-promulgated Federal Rules of Civil Procedure from going into effect until they had been reported to the Congress and a certain amount of time had passed.²⁶¹ The Supreme Court stated that without the one-house veto § 244(c)(2) would have been similar to the statutory provision found Constitutional in *Sibbach*.²⁶² The Inhofe proposal is analogous to the *Sibbach* statute, rather than to the *Chadha* statute, because a joint resolution passed by both houses of Congress requires the signature of the President in order to have the force of law.²⁶³ Therefore

²⁵⁷ *Id.* at 952.

²⁵⁸ *Chadha*, 462 U.S. at 959.

²⁵⁹ *Id.* at 959–60 (Powell, J., concurring in the judgment); *id.* at 967 (White, J., dissenting) ("Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'").

²⁶⁰ *Sibbach v. Wilson*, 312 U.S. 1, 15 (1941).

²⁶¹ *Id.* at 15–16; *Chadha*, 462 U.S. at 935 n.9 ("[The *Sibbach* statute] did *not* provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable.") (emphasis in original).

²⁶² *Chadha*, 462 U.S. at 935, n.8–9.

²⁶³ A joint resolution "requires the approval of both chambers and, with [the exception of constitutional amendments], is submitted (just as a bill) to the President for possible signature into law." United States Senate Glossary, http://www.senate.gov/reference/glossary_term/joint_resolution.htm; accord BLACK'S LAW DICTIONARY 1178 (8th ed. 1999). However, it should be noted that while the language of the statute—"joint resolution"—would by definition include presentment to the President for signature, there is a slight possibility that this is not the intent of the

there is probably no bicameralism or presentment problem for Senator Inhofe's proposal, which functions as a "report-and-wait" provision rather than a legislative veto prohibited by *Chadha*.

The Supreme Court recognized that the powers of the President in the field of national security are extremely strong in *United States v. Curtiss-Wright Export Corp.*²⁶⁴ The Court in that case explained that "the President alone has the power to speak or listen as a representative of the nation."²⁶⁵ In order to allow the President to fully carry out this constitutional duty:

[I]f, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He [also] has his agents in the form of diplomatic, consular and other officials.²⁶⁶

These statements were made in the context of an evaluation by the Court of a statute that allowed the President to forbid the sale of arms to certain countries if he found doing so was necessary to ensure peace.²⁶⁷ Such a statute, which recognizes the complete authority of the President to make a decision in a field of national security, seems analogous at a minimum to the current Exon-Florio statute. Additionally, Justice Jackson's concurring opinion in the "Steel Seizure Case"—which has come to be the defining opinion on such separation of powers issues—stated that in the field of national security, especially when authorized by an act of Congress, the President's power was "at its maximum."²⁶⁸ While *Curtiss-Wright Export Co.* and Justice Jackson's concurring opinion in *Youngstown* do not definitively mean that Inhofe's proposal is unconstitutional, they do raise

drafters, because no mention of the President is made in the bill's description of this process. If Senator Inhofe's bill is meant to exclude the President, and merely to allow Congress on its own initiative to block a transaction, then there would clearly be a problem under *Chadha*, and the involvement of Congress in such a manner would be clearly unconstitutional.

²⁶⁴ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936); accord *THE FEDERALIST* NO. 64 (John Jay).

²⁶⁵ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319.

²⁶⁶ *Id.* at 320.

²⁶⁷ *Id.* at 311–13.

²⁶⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring).

serious separation of powers concerns regarding Congress's proposed involvement in the CFIUS process, and at a minimum give strong persuasive weight to policy arguments against such involvement.

If the concept of giving Congress oversight authority over the President's CFIUS decision is completely acceptable from a constitutional standpoint, such a system would prove highly disruptive to the current balance between national security and open investment maintained by the Exon-Florio statute.²⁶⁹ Already many corporations view CFIUS as a tool that can be used as another anti-takeover device in the corporate arsenal; lobbying the Department of Defense to oppose CFIUS approval of a transaction has even been termed a "Pentagon ploy" and is presented as an anti-takeover defense in a leading mergers and acquisitions casebook for law students.²⁷⁰ Were corporations and local officeholders in areas where those corporations are located able to lobby members of Congress in order to seek their support in an effort to block a takeover by foreign persons, CFIUS would succumb even further to protectionist pressures.²⁷¹ It has already been seen that even without an express statutory role in the Exon-Florio process, members of Congress often insert themselves in that process in order to address various concerns ranging from protecting hometown companies to advancing national security.²⁷² If their role were expanded to include the ability to

²⁶⁹ See, e.g., *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick, Partner, Covington and Burling).

²⁷⁰ DALE OESTERLE, *THE LAW OF MERGERS AND ACQUISITIONS* 917–20 (3d ed. 2005). There is no need to review the legality of CFIUS as a takeover defense under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) or *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

²⁷¹ *Ports of Gall*, *supra* note 217, at A10 ("[CFIUS] is an executive branch function precisely to avoid the parochial concerns that dominate Congress. If Congress ran CFIUS, every Member would have a chance to interfere with every private foreign investment."). In fact, in the time since the DPW controversy, some businesses contemplating CFIUS-qualifying mergers have hired lobbyists to promote the deal in Congress in order to avoid a similar negative reaction. See, e.g., Judy Sarasohn, *Alcatel and Lucent Lobbyists Are on the Job*, WASH. POST, May 11, 2006, at A25 (describing the hiring of former Bush Administration associate counsel Reginald Brown and former Clinton Administration Deputy Attorney General Jamie Gorelick, along with other high-profiled lobbyists, to avoid a repeat of the DPW controversy over the merger of the French company Alcatel with the U.S. company Lucent Technologies).

²⁷² See *supra* notes 161–68 for a discussion of Congress's role in the CNOOC affair; *supra* notes 177–90 for Congress's role in the DPW transaction; Iritani, *supra* note 236, at 3, for a representative effort by an individual member, Senator Bayh, to influence a home-state transaction. Recently, Representative Carolyn Maloney (D-NY) illustrated the perils of turning CFIUS into a tool by which lawmakers can push their own causes when she called on CFIUS to investigate the acquisition of a "U.S. supplier of voting equipment by a Boca Raton company that once had controversial connections to the Venezuelan government." Pablo Bachelet, *Voting Machine Sale in Question*, MIAMI

overrule a presidential decision based on a joint resolution, the focus on the Exon-Florio process would shift towards being a protectionist tool, rather than an effective and disciplined means of protecting national security.²⁷³ Such a system would inject great instability into the mergers and acquisitions business environment without any significant contribution to national security. Instability of this nature could potentially lead to fewer merger and acquisition attempts, a result that would ultimately have a negative impact on the U.S. economy and economic growth.

2. Enhanced Reporting Requirements

Nearly every proposal to amend Exon-Florio, both in the past and in the aftermath of the CNOOC and DPW deals, has included a provision requiring enhanced reporting by CFIUS to Congress on its review and investigation activities. For example, after the Thomson/LTV transaction controversy, Congress passed an amendment to Exon-Florio proposed by Senator Byrd.²⁷⁴ The Byrd Amendment was not limited to the mandatory investigations issue described earlier in this Note; it also strengthened the requirement that when a President makes a decision on a transaction he must transmit a report to Congress detailing the reasons for his decision.²⁷⁵ Because presidential decisions on CFIUS transactions are rare, these reports are almost never

HERALD, May 9, 2006, at 13A. While the author applauds Representative Maloney's willingness to criticize Venezuela's Hugo Chavez, considering his vitriolic anti-American stance and willingness to harm the interests of Venezuelan citizens, a call for CFIUS to investigate such an extremely thin link to a foreign government seems based more on political opportunism than any real national security concern.

²⁷³ *Ports of Gall*, *supra* note 217, at A10; *see also The New Protectionists: How to Create a Real Security Crisis*, *supra* note 235, at A18 ("If you think corruption on Capitol Hill is bad now, wait until [foreign companies] need approval from Congress for every multi-billion-dollar investment."). Of course, the reverse argument made by the members of Congress who support such a change to Exon-Florio is that by involving Congress in the Exon-Florio process, national security will be strengthened because Congress will serve as a check on an open investment policy approach that ignores national security. While not without merit, this argument ignores the fact that the Department of Defense, not to mention the Department of Homeland Security and other security-focused agencies and White House officials, already hold great influence in the CFIUS process and are the entities best equipped to assess national security threats and to communicate their concerns to the President. It appears, then, that the argument that involving Congress will enhance national security is mostly, though not completely, a smokescreen for advancing protectionism and enhancing the power of individual lawmakers.

²⁷⁴ *See supra* notes 117–20.

²⁷⁵ 50 U.S.C. app. § 2170(g) (2000).

made.²⁷⁶ Another amendment added a requirement that CFIUS and the President provide Congress with a quadrennial report evaluating whether foreign countries have concerted strategies to acquire U.S. companies in a certain area and addressing the scope of industrial espionage activities in the country.²⁷⁷ Only one of the statutorily-required quadrennial reports has ever been provided to Congress, in 1994.²⁷⁸

In the aftermath of the CNOOC and DPW transactions, numerous members of Congress again expressed concern that CFIUS does not provide sufficient information to Congress regarding its reviews of mergers and acquisitions,²⁷⁹ and several proposals to correct this lack of adequate information-sharing with Congress were suggested.²⁸⁰

Critics of CFIUS often argue that the Committee is too secretive. Secrecy, however, is mandated by the Exon-Florio statute; CFIUS is forbidden from sharing information contained in CFIUS filings with the

²⁷⁶ President George H. W. Bush issued one of these reports, though under the pre-Byrd Amendment requirements, after ordering the divestiture of MAMCO by CATIC. Message to the Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Inc., President George H. W. Bush, Feb. 1, 1990, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=18109>.

²⁷⁷ 50 U.S.C. app. § 2170(k).

²⁷⁸ See generally NATIONAL ECONOMIC COUNCIL, REPORT ON U.S. CRITICAL TECHNOLOGY COMPANIES: REPORT TO CONGRESS ON FOREIGN ACQUISITION OF AND ESPIONAGE ACTIVITIES AGAINST U.S. CRITICAL TECHNOLOGY COMPANIES (1994).

²⁷⁹ See, e.g., 152 CONG. REC. E233, 235 (2006) (statement of Representative Peter T. King, R-NY) ("The lack of notification [until after a forty-five-day investigation and Presidential decision are complete] has led to the situation where the concerns of senior Administration officials, Members of Congress and the general public cannot be expressed until after a deal is done. This lack of transparency must change.").

²⁸⁰ For example, Senator Inhofe's proposal would have extended 50 U.S.C. app. § 2170(g) to include a requirement that CFIUS provide quarterly reports to the House and Senate committees with jurisdiction over CFIUS:

(2) Quarterly submissions. The Secretary of the Treasury shall transmit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on a quarterly basis, a detailed summary and analysis of each merger, acquisition, or takeover that is being reviewed, was reviewed during the preceding 90-day period, or is likely to be reviewed in the coming quarter by the President or the President's designee under subsection (a) or (b). Each such summary and analysis shall be submitted in unclassified form, with classified annexes as the Secretary determines are required to protect company proprietary information and other sensitive information. Each such summary and analysis shall include an appendix detailing dissenting views.

Foreign Investment Security Act of 2005, S. 1797, 109th Cong. § 4(2) (2005). Senator Inhofe's proposal would also change CFIUS reviews from a thirty to sixty-day process and require a report to Congress after the completion of each review. *Id.*

general public.²⁸¹ This confidentiality provision, however, is juxtaposed against a clear requirement that CFIUS share information contained in these filings with Congress when asked to do so.²⁸² In order to comply with both of these seemingly conflicting statutory mandates, CFIUS representatives generally refuse to answer questions in public hearings but rather reserve their answers for closed meetings with Members of Congress.²⁸³ This provision is entirely appropriate and reflects the policy judgment made by Congress in 1988 when it rejected the Bryant Amendment on the grounds that requiring disclosure of detailed corporate information could serve as a hindrance to foreign investment.

The same cannot be said of CFIUS's poor track record for giving Congress regular updates on its reviews and investigations.²⁸⁴ The results of this lack of information sharing were evident in the Dubai Ports World controversy; most members of Congress learned of the acquisition of P&O by DPW through press reports days before the deal was to close and after CFIUS had already ruled out the need for a forty-five day investigation.²⁸⁵ Oversight of executive branch actions is clearly a proper role for Congress, especially when it was Congress that created the Exon-Florio review authority in the first place. The Deputy Secretary of the Treasury has acknowledged that improvements should be made in terms of CFIUS's communication with and reports to Congress.²⁸⁶ In fact, enhancing the

²⁸¹ 50 U.S.C. app. § 2170(c).

²⁸² *Id.*

²⁸³ See, e.g., *Department of Defense Hearings*, *supra* note 106, at 228 (statement of Stephen J. Canner, Treasury Office Director for International Investment) ("You will appreciate, I hope, that there is little I can say in a public forum on a transaction which is now before [CFIUS] . . .").

²⁸⁴ See, e.g., C. Fred Bergsten, Editorial, *Avoiding Another Dubai*, WASH. POST, Feb. 28, 2006, at A15.

²⁸⁵ Of course, not all the blame can be placed on CFIUS, because the acquisition was in fact not secret. Reports of the DPW transaction first surfaced in November 2005, and DPW was open about its intentions in press releases. See Press Release, Dubai Ports World, Recommended Cash Acquisition of the Peninsular and Oriental Steam Navigation Company ("P&O") by Thunder FZE (the "Offeror"), a Wholly Owned Subsidiary of Ports, Customs and Free Zone Corporation, Dubai ("PCFC") (Nov. 29, 2005), <http://www.dpworld.com/wadmin/imgdb/DP%20World%20Offer%20for%20P&O%20Press%20Release.pdf>. Therefore, members of Congress who learned of the transaction early could have voiced their concerns even before the CFIUS review began.

²⁸⁶ The Administration expressed this willingness through comments made by Deputy Secretary of the Treasury Robert Kimmitt:

Lastly, in picking up on your important point regarding Congress's oversight role, we support the idea of enhancing the transparency of the CFIUS process through more effective communication with Congress, while recognizing our shared responsibility to avoid the disclosure of proprietary information. . . . We're very

reporting requirements is a more appropriate oversight role for Congress to take than actually inserting itself into the approval process as described in the section above.²⁸⁷ Therefore, the critical question about this proposed change to Exon-Florio is not whether it should be made, but what form it should take in order to enhance, rather than upset, the current balance between national security and foreign investment.

Fortunately, enhancing CFIUS's reporting requirements—or even simply insisting that the present requirements be carried out—is unlikely to upset the current Exon-Florio balance. Any reports that must be submitted to Congress containing detailed information on specific transactions are confidential, and thus their contents may not be released to the public; the release of such information would discourage foreign investment in this country.²⁸⁸ Additionally, Congress already has chosen to involve itself in CFIUS matters from time to time, as demonstrated by its involvement in the Thomson/LTV, CNOOC, and DPW transactions, among others. While enhanced reporting requirements have the potential to marginally increase the quantity of this interference, they could also prevent anger and misunderstanding of important factual issues as occurred in the DPW case, and thus possibly head off unwise overreactions to specific transactions.²⁸⁹ Therefore, it is entirely appropriate for Congress to make changes to the reporting system. For

open to suggestions on ways to improve the transparency of the process such as more regular reports to Congress and congressional briefings.

Implementation Hearings, supra note 214.

²⁸⁷ “Congress has a legitimate and important oversight role ensuring that the Exon-Florio statute is implemented correctly. But Congress should not itself become a regulatory agency. Congress has not, and would not, override Hart-Scott-Rodino decisions made by the Department of Justice or the FTC.” *Dubai Purchase Hearings, supra* note 138 (statement of David Marchick, Partner, Covington and Burling).

²⁸⁸ See *supra* text accompanying notes 136–39.

²⁸⁹ A former Treasury Department official who worked with CFIUS recently wrote: “[The Exon-Florio] process contains a major flaw: its failure to inform Congress of pending transactions in a way that would enable lawmakers to express meaningful objections in an orderly manner.” Bergsten, *supra* note 284, at A15. The current system, short on information sharing with Congress, leads to a situation where “Congress can therefore express its concerns only by leaping into individual cases with great fanfare.” *Id.* The benefit of giving Congress at least some sort of report on the results of an investigation seem to be demonstrated by the fact that when CFIUS and the President recently gave the green light to the acquisition of Doncasters, a British company that supplies parts to U.S. military vehicles and aircraft by a Dubai-owned company, there was very little protest from Congress. *E.g.*, Stephanie Kirchgaessner, *White House Approves Buying of “Sensitive” Defence Group by Dubai*, FIN. TIMES (London), Apr. 29, 2006, at 7. The President had sent a letter and a classified intelligence assessment of the deal to the leaders of the House and Senate. Letter from the President to the Speaker of the House of Representatives and the President of the Senate (Apr. 28, 2006), <http://www.whitehouse.gov/news/releases/2006/04/20060428-4.html>.

example, the proposed change to a quarterly or monthly reports requirement and notification of the results of a review after its completion—such as those proposed by Senator Inhofe and Representative Blunt, respectively—may introduce positive improvement to the Exon-Florio process.

3. *Economic Security as an Element of CFIUS Review*

Senator Inhofe's proposal would have made the factors currently laid out in the Exon-Florio statute²⁹⁰ as elements of national security mandatory, rather than discretionary, and also would have added a new factor: "the long-term projections of United States requirements for sources of energy and other critical resources and materials and for *economic security*."²⁹¹ This proposal could have a tremendous impact on both the actual operation of CFIUS and on the role of government in the business world in general. As stated previously, the term "national security," currently undefined, can be used to cover threats which may not fit within a traditional military definition and which have ancillary effects on economic security.²⁹² Thus, it may not seem that the addition of economic security as a factor that must be considered in CFIUS's national security review process would present a significant change to CFIUS's implementation, but in fact this "small" change would actually transform the entire framework and purpose of the Committee in a radical manner.²⁹³ With a requirement that the Committee consider threats to economic security as threats to national security, the system would shift from a process focused on finding true threats to national security to a protectionist economic tool.²⁹⁴

²⁹⁰ These factors include "the capability and capacity of domestic industry to meet national defense requirements," and "domestic production needed for projected national defense requirements." 50 U.S.C. app. § 2170(f) (2000).

²⁹¹ Foreign Investment Security Act of 2005, S. 1797, 109th Cong. § 2(3) (2005) (emphasis added).

²⁹² See Kimmitt, *supra* note 212.

²⁹³ The importance that would be attached to adding economic security as an Exon-Florio consideration is underscored by the fact that Republicans in Congress in 1988 urged the President to veto the trade bill that contained Exon-Florio if economic security was not removed, and that Democrats took this threat seriously enough to remove it from the final version of Exon-Florio. See *supra* notes 61–62.

²⁹⁴ "[T]here is good reason to believe that an 'economic security' test would simply become a vehicle for domestic industries seeking to block foreign competition." *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick, Partner, Covington and Burling). The editorial board of the *Wall Street Journal* has speculated that efforts to block the DPW transaction and to amend the CFIUS statute may demonstrate the "re-emergence of the 'national security' protectionists." Editorial, *The New Protectionists: How to Create a Real Security Crisis*, *supra* note 235, at A18.

For example, under the present system, the Department of Defense could plausibly argue that a threat to the oil supply of the United States would threaten national security due to the direct role oil has in the operation of military aircraft, the functioning of bases, the movement of weapons and soldiers, as well as the operation of the country in such areas as telecommunications and other high-tech areas that are now considered essential to our national defense.²⁹⁵ This approach informally and appropriately includes economic security considerations. However, if economic security were considered a factor in its own right, a CFIUS member agency could argue, for example, that the purchase of an American automobile company would further undermine the weak American auto industry and cut jobs, thereby harming the American economy and national security. It is easy to envision multiple scenarios of this sort where any company unhappy with a foreign takeover attempt, or any Congressman unhappy with the effects of a foreign acquisition of a company within his district, could put pressure on the members of CFIUS to block transactions that under the current conception of national security could not be blocked.²⁹⁶

Thus, including economic security as an element of CFIUS review would fundamentally transform CFIUS from a purely national security-focused agency to one that concerned itself with *all* mergers and acquisitions, and therefore a tool which could undermine the open foreign investment goals that have been promoted by the United States for decades.²⁹⁷ By including economic security as a criterion in the CFIUS review process, Congress would open the door for “domestic competitor[s], who lose[] out in mergers and acquisitions competition, [to] use the CFIUS process to lobby to block the deal and achieve in the legislative process what they couldn’t achieve in the marketplace.”²⁹⁸ Merely by including economic security within CFIUS’s review criteria, Congress would reduce CFIUS’s ability to protect national

²⁹⁵ Since September 11, 2001, and the addition of DHS to CFIUS’s membership, the Committee seems to have expanded its conception of national security to include critical infrastructure protection. See, e.g., *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick, Partner, Covington and Burling).

²⁹⁶ *The New Protectionists: How to Create a Real Security Crisis*, *supra* note 235, at A18.

²⁹⁷ *Dubai Purchase Hearings*, *supra* note 138 (prepared statement of Todd M. Malan, President and CEO, Organization for International Investment). Every President since Ronald Reagan has actively encouraged foreign direct investment into the United States. “[T]he executive branch historically has been a strong advocate of an open investment policy” Tate, *supra* note 6, at 2026 (in discussion of Exon-Florio) (footnotes omitted).

²⁹⁸ *Dubai Purchase Hearings*, *supra* note 138 (statement of Todd M. Malan, President and CEO, Organization for International Investment).

security because of the resources and time that would necessarily be diverted to dealing with economic issues. For example, if economic security were a guiding consideration, CFIUS could be forced to spend time on protecting the U.S. dairy industry from foreign takeover, a prospect that sounds preposterous in the abstract but that is actually quite plausible considering the lobbying efforts of that industry on Capitol Hill.²⁹⁹ Deciding such matters is not the appropriate role for a body that was originally tasked to protect national security; to expand into the economic arena, then, would shortchange national security concerns while imposing harmful restrictions on the free market.

These restrictions on foreign investment, in turn, could encourage foreign countries to impose their own limitations on foreign investments from abroad, including from the United States.³⁰⁰ The subsequent decrease in foreign investment from abroad and in foreign opportunities for American investors overseas would have an overall negative effect on the U.S. economy, which in turn would negatively affect national security. For example, in 2005 China was the most popular destination in the world for foreign investment, a position long held by the United States.³⁰¹ Were

²⁹⁹ See *id.*

³⁰⁰ See *Implementation Hearings*, *supra* note 214 (testimony of Robert Kimmitt, Deputy Secretary of the Treasury) (discussing U.S. efforts to open up foreign countries to foreign investment and the importance of U.S. credibility on this issue to those efforts). This fear has already begun to play itself out in fact, as some foreign governments and companies have taken the visceral reaction against the DPW deal and the loud calls in Congress for changes to Exon-Florio as signs that the United States is less open to foreign investment today than it was in the past. See, e.g., Brent Shearer, *Raising Barriers to Inbound Deals: Political Intervention Is Feared in Future Cross-Border M&A*, MERGERS & ACQUISITIONS: DEALMAKER'S J., Vol. 41, Issue 5, May 29, 2006, at 22 ("M&A experts are scrambling to make sense of the controversy's impact on future global dealmaking."); Geoff Elliott, *US Fears for Alien Investor Security*, AUSTRALIAN, June 5, 2006, at 19 (Australian newspaper refers to an "outbreak of xenophobia towards foreign investors" in the U.S.); Jean Eaglesham, *Free Trade "Is Not a One-Way Street" Says UK in Attack on US "Hypocrisy"*, FIN. TIMES (London), Mar. 31, 2006, at 9 (British trade and industry secretary Alan Johnson criticizes United States for undermining free trade and open investment principles by rejecting DPW deal and planning to broaden scope of CFIUS, and warned that free trade cannot be a one-way street). The top financial regulator in South Korea even pointed to Exon-Florio as support for his view that his country should take steps to protect certain industries from foreign acquisition. Kim Jung-Min, *Seoul Plans Restrictions on Foreign M&As*, KOREA HERALD, Apr. 5, 2006.

³⁰¹ ORGANIZATION FOR INT'L INVESTMENT, THE INSOURCING SURVEY: PERCEPTIONS OF THE ATTRACTIVENESS OF THE UNITED STATES AS A LOCATION FOR INTERNATIONAL INVESTMENT AND JOB CREATION: A CEO-LEVEL SURVEY OF U.S. SUBSIDIARIES OF FOREIGN COMPANIES 4 (2005), available at http://www.ofii.org/issues/insourcing_survey.pdf (stating that almost half of all CEOs

foreign companies to view the United States as hostile to their investment efforts, an even greater incentive would exist to direct resources towards China—a result which would clearly make China an even greater economic and national security threat to the United States than it already is. An examination of the negative effects of protectionism on the U.S. economy is beyond the scope of this Note. Rather, it is sufficient to realize that opening up CFIUS reviews to considerations of economic security would fundamentally alter CFIUS's role and upset the current national security and open investment balance, as well as undermine long-standing U.S. government efforts to open foreign countries to foreign investment.³⁰²

4. *Finding a New Agency to Chair CFIUS*

Various members of Congress and commentators who have expressed displeasure with the implementation of Exon-Florio by CFIUS in the past have often singled out the Department of the Treasury for criticism in regards to its chairmanship of the Committee.³⁰³ In their view, Treasury is institutionally inclined to favor and promote foreign investment—an assertion that is absolutely true, as the promotion of foreign investment in the United States is in fact one of the missions of the department.³⁰⁴ In the view of these individuals, Treasury is therefore not the appropriate agency to be heading up a committee concerned with national security, especially when the goal of that Committee is to critically review and possibly urge the President to block such investment.³⁰⁵ Some of these critics—as well as the GAO's 2005 report on CFIUS—have charged the Treasury Department with exerting pressure on the other member agencies to adopt its allegedly more narrow view of national security.³⁰⁶ These individuals have generally favored

viewed China as their priority for future investment, while only twenty-seven percent singled out the United States).

³⁰² The United States is a signatory to a number of international treaties promoting free trade and open investment. For example, the United States is a member of the World Trade Organization. World Trade Organization, United States Member Information Page, http://www.wto.int/english/thewto_e/countries_e/usa_e.htm (last visited Oct. 8, 2006). Additionally, the United States Trade Representative, a cabinet-level executive branch position, is tasked with promoting free trade and open investment in countries around the world; general information about this office can be found at http://www.ustr.gov/Who_We_Are/Section_Index.html (last visited Oct. 8, 2006).

³⁰³ See, e.g., Frank J. Gaffney, Jr., Editorial, *Peril in Port*, N.Y. SUN, Feb. 15, 2006, at 11.

³⁰⁴ *Id.*

³⁰⁵ E.g., Paul Blustein, *Ports Debate Reawakens Foreign-Investment Jitters: Proposed Takeover Pits Security Against Economic Fears*, WASH. POST, Feb. 23, 2006, at D1.

³⁰⁶ *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 11–13.

moving the chairmanship of CFIUS to the Department of Defense, an agency with a clear institutional mission in favor of the protection of national security.³⁰⁷ More recently, the Department of Homeland Security has been suggested as a better candidate for the chairmanship of CFIUS, or even as a possible co-chairman with the Treasury Department.³⁰⁸ Similarly, one senator even went so far as to suggest that he would introduce legislation that would require the Director of National Intelligence (“DNI”) to approve all foreign investment in the United States³⁰⁹—a move that is clearly protectionist, as it would create a presumption that deals are to be disallowed unless facts demonstrate a need for a different outcome. (That is to say nothing of the fact that giving such a huge responsibility to the DNI would seem to contradict the streamlining-of-the-intelligence-process function that was supposed to be served by the DNI’s creation.)³¹⁰

These CFIUS critics certainly have the right motivation; it is entirely correct to argue that CFIUS should be institutionally capable of acting to stop any transaction that presents a serious national security problem. They are correct that open foreign investment concerns must yield when national security is implicated. However, moving the chairmanship of CFIUS to the Departments of Defense or Homeland Security would provide no meaningful additional benefit in terms of protecting national security, and would in operation likely harm the correct default position taken by CFIUS under Treasury’s leadership—that “foreign investment is welcome unless it threatens national security.”³¹¹ This presumption is the appropriate one not only to maintain the current Exon-Florio balance, but also the best means to implement the legislative compromise that was struck when Exon-Florio was passed.

³⁰⁷ *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick, Partner, Covington and Burling).

³⁰⁸ See, e.g., 152 CONG. REC. E233, E235 (2006) (statement of Representative Peter T. King, (R-NY) suggesting DHS serve as the co-chair of CFIUS).

³⁰⁹ Michael Schroeder & Greg Hitt, *Ports in a Storm: Congress May Fine-Tune Process To Vet Foreign-Investment Deals*, WALL ST. J., Feb. 23, 2006, at A12 (proposal of Sen. Evan Bayh).

³¹⁰ Office of the Director of Nat’l Intelligence, About ODNI, <http://www.dni.gov/aboutODNI/who.htm> (last visited Oct. 8, 2006).

³¹¹ *Dubai Purchase Hearings*, *supra* note 138 (statement of David Marchick) (“Under Treasury’s leadership, the presumption is – and should remain – that foreign investment is welcome unless it threatens national security. If CFIUS were chaired by an agency with a security mission, the presumption would be reversed.”).

As currently constituted, CFIUS fosters dynamic interaction between members that leads to the best possible results.³¹² Deputy Secretary of the Treasury Robert Kimmitt told Congress in 2006:

As an inter-agency group, CFIUS provides a forum for discussion and yes, debate among members representing 12 different executive departments and offices. . . .

The give and take among members leads to a comprehensive examination of transactions from all relevant agencies. There was a natural competition of differing perspectives on the part of CFIUS members, and vigorous debates and constructive friction among members helped CFIUS ultimately determine the best possible outcome for our national security.³¹³

While the CFIUS regulations accommodate the possibility that the Committee may split on a given transaction and thus have to provide majority and dissenting views to the President after a forty-five-day investigation,³¹⁴ Treasury has indicated that the Committee generally “operates by consensus among its members.”³¹⁵ In other words, if even one member agency objects to a transaction, the Committee moves into the forty-five-day investigation phase.³¹⁶ This consensus feature is part of what makes the give and take that currently exists between member agencies so important; an agency which does not approve of a transaction has the power to single-handedly prevent approval.

Therefore, while the Treasury Department may chair the Committee, it does not control the decisions of other member agencies. If a security-focused agency like DOD were to object to a deal, it would be wrong to assume that those concerns could be overridden by the other agencies or the Treasury acting alone. Therefore, keeping the chairmanship of CFIUS at the Department of the Treasury serves as a signal to foreign investors that their participation in the U.S. economy is welcome, while ensuring that genuine national security concerns will be dealt with appropriately.³¹⁷ Shifting the chairmanship to DOD—or to the DNI or DHS, for that matter—could effectively upset this balance with little to no added security benefit, because

³¹² *Implementation Hearings*, *supra* note 214 (statement of Robert Kimmitt, Deputy Secretary of the Treasury).

³¹³ *Id.*

³¹⁴ 31 C.F.R. § 800.504 (2005).

³¹⁵ *Dubai Purchase Hearings*, *supra* note 138 (statement of Robert Kimmitt, Deputy Secretary of the Treasury).

³¹⁶ *Id.*

³¹⁷ *E.g., id.*

these security-minded agencies already have ample influence and ability to be heard within CFIUS.

VI. CONCLUSION

As this Note has demonstrated, the Exon-Florio statute currently maintains a balance between strong, vigilant enforcement of national security needs and the goal of maintaining an open foreign investment policy. While numerous critics, including many powerful and sensible members of Congress, have claimed that CFIUS's implementation of Exon-Florio and the Department of the Treasury's leadership of that Committee are lax, the facts point to a different conclusion. Many of the details of how CFIUS operates in fact are not reflected in the details of the statute. For example, while many critics point to the fact that only one presidential decision to order divestiture of an American company has ever been made under Exon-Florio, those familiar with the process have testified that the mere possibility of Exon-Florio review has dissuaded far more transactions that would have presented serious national security challenges from proceeding. Additionally, CFIUS member agencies have in recent years improved their negotiation and monitoring of mitigation agreements that allow transactions to proceed while addressing national security concerns. In other words, the system as it currently exists is able to provide adequate national security protections while refraining from becoming a protectionist tool.

Many of the proposals to amend Exon-Florio that are currently receiving attention are unwise because they would upset this balance. While enhanced reporting by CFIUS to Congress is a good idea—and might help avoid problems like those associated with the Dubai Ports World deal—other proposals, while well-intentioned, go too far towards promoting protectionism while not providing any additional significant benefit to national security. If economic security becomes a facet of CFIUS review, if Congress inserts itself into the CFIUS process by virtue of a “report and wait” provision, or if the chairmanship of CFIUS is moved from Treasury to another cabinet department, we can expect significant changes in how CFIUS conducts business. These changes, however, will not be limited to the positive ones sought by many in Congress today, but instead could result in serious negative economic consequences as other foreign persons decrease their foreign investments in the United States or even change their own investment laws. Such a result certainly would not effectively serve our nation's national security needs.